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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions	3
Statement of the Case	4
Reasons for Granting the Writ	8
Appendix A	A-1
Appendix B	A-27
Appendix C	A-28

CITATIONS

Cases

Appalachian Power Co. v. EPA (4th CCA), 477 F(2) 495	8
Buckeye Power Co. v. EPA (6th CCA), 481 F(2) 162	6, 8
Getty Oil Co. v. Ruckleshaw (3d CCA), 467 F(2) 349	8
Indiana & Michigan Electric Co. v. EPA (7th CCA), 509 F(2) 839	6, 8
Natural Resources Defense Council v. EPA (9th CCA), 507 F(2) 905	8
St. Joe Minerals Corp. v. EPA (3d CCA), 508 F(2) 743	8
South Terminal Corp. v. EPA (1st CCA), 504 F(2) 646	8
Texas v. EPA (5th CCA), 499 F(2) 289	8

Statutory and Constitutional Provisions

Section 113(c)(1), Clean Air Act Amendments—42 USC Section 1857c-8(c)(1) 7

Section 307(b)(1), Clean Air Act Amendments, 42 USC Section 1857h-5(b)(1) 3, 4, 6, 7, 8

Article III of the United States Constitution 2, 3, 4, 9

Fifth Amendment of the United States Constitution 2, 4, 9

Report of Senate Committee

Report 91-1196 of Senate Committee on Public Works accompanying S. 4358, 91st Congress, 2nd Session—dated September 17, 1970 ..... 6, 9

Supreme Court Rule

Rule 19 9

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To the United States Court of Appeals for the Eighth Circuit

Union Electric Company, the petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on March 27, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported in CCH Pollution Control Guide, Vol. 4, Par. 15.120, but not yet reported in the Federal Reporter, is printed in Appendix A. The judgment of the Eighth Circuit, filed on March 27, 1975, is printed in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 27, 1975. No rehearing was sought. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does the Section of the Clean Air Act (Section 307 (b)(1)), which provides for judicial review by the Court of Appeals of EPA approval of sulfur dioxide emission regulations in the Missouri implementation plan, prevent the Court of Appeals from considering technological and economic factors applicable to petitioner and such regulations, when the petition for judicial review was filed more than 30 days after EPA approval of such plan, when such technological and economic factors arose more than 30 days after EPA approval and when those factors make it impossible for petitioner to comply with those regulations and manifestly against the public interest for it to attempt to do so?

2. If this section of the Clean Air Act prohibits the Court of Appeals, on judicial review of implementation plans, from considering such technological and economic factors, does it violate Article III of the United States Constitution by denying to the Court of Appeals the judicial power entrusted to it by Section 2 of that Article?

3. If the section of the Clean Air Act providing for judicial review of implementation plans prevents judicial consideration of petitioner's impossibility and economic claims, does the section thereby deprive petitioner of property without due process of law and without just compensation in violation of the 5th Amendment to the United States Constitution?

4. Does the judicial review section of the Clean Air Act prohibit the Eighth Circuit Court of Appeals, on petition for review of the Missouri implementation plan, from considering the changed opinion of the medical community concerning the effect on health of sulfur dioxide, when that changed opinion did not become known until more than 30 days after the Missouri implementation plan was approved by the EPA, and does that section require that such changed opinion be first considered by the EPA and that judicial review on the basis thereof, if any, be sought only in the United States Court of Appeals for the District of Columbia?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The most significant part of Section 307(b)(1) of the Clean Air Act amendments (42 U.S.C. Sec. 1857h-5(b)(1)) says:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval or after such date if such petition is based solely on grounds arising after such 30th day."

For the convenience of the Court, Section 307(b)(1) in its entirety is printed in Appendix C.

Section 1 of Article III of the United States Constitution says that:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of Article III of the United States Constitution says that:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States . . ."

The Fifth Amendment to the United States Constitution says that:

> "No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

On August 19, 1974, petitioner Union Electric Company filed in the United States Court of Appeals for the Eighth Circuit a petition pursuant to Section 307(b)(1) of the Clean Air Act Amendments (42 U.S.C. Sec. 1857h-5(b)(1)) for review of certain of the sulfur dioxide emission regulations of the Missouri implementation plan. That implementation plan had been approved by the Administrator of respondent EPA on May 31, 1972. As permitted by the above cited section, the petition stated that it was based solely on grounds arising more than 30 days after the Administrator's approval of the plan.

The grounds were detailed in the petition as follows:

> 1. The Arabian Oil Embargo and related economic factors, occurring after June 30, 1972 (a date which was 30 days following approval of the plan), have resulted in such a shortage of, and high price for, low sulfur coal that it is impossible for petitioner to obtain a sufficient quantity to comply with the plan's sulfur regulation or, alternatively, the cost of such coal, if it could be obtained, would make its purchase manifestly against the public interest.

> 2. Since June 30, 1972, it has been demonstrated that sulfur dioxide removal equipment (scrubbers), which would enable the sulfur regulation to be met, have not been developed or invented.
>
> 3. Since June 30, 1972, the price of scrubbers so far developed has increased so much that installation costs at three of petitioner's plants would be more than $500,000,000.
>
> 4. Because of economic factors occurring since June 30, 1972, it would be impossible to obtain financing required to install such scrubbers. Alternatively, if financing could be obtained and installation effected, the carrying, operating and maintenance costs of over $120,000,000 annually would be manifestly against the public interest.
>
> 5. Research and reports made known since June 30, 1972, disclose that sulfur dioxide in the ambient air is not the medical hazard it was previously thought to be.
>
> 6. Since June 30, 1972, it has been demonstrated that compliance with the sulfur regulations is not necessary for fulfillment of the national primary and secondary ambient air standards in the St. Louis Metropolitan area.
>
> (See paragraphs 21 through 27 of the Petition, as amended, which constitute items 1 and 3 of the record filed with this Court by the Clerk for the Eighth Circuit on or about April 23, 1975).

The Court of Appeals ordered that the case be briefed and argued solely on the question of its subject matter jurisdiction. Motions to dismiss for lack of jurisdiction were filed by respondent EPA and intervenor-respondents State of Missouri and the Missouri Air Conservation Commission. Following the submission of briefs and oral argument, those motions were sustained in the opinion set forth in Appendix A.

The Court of Appeals held that technological and economic factors cannot be judicially considered in a Section 307(b)(1) proceeding, regardless of whether it is brought within 30 days of EPA approval of the plan or whether it is brought after such 30 days and based solely on grounds arising thereafter. The Eighth Circuit did not, as some circuits have (*Buckeye Power Inc. v. EPA* (6th CCA), 481 F(2) 162, 173, and *Indiana and Michigan Electric Company v. EPA* (7th CCA), 509 F (2) 839, 845), hold that such factors may be judicially considered in an enforcement proceeding. To the contrary the Eighth Circuit opinion states that these factors may never be judicially considered. For example on pp. 22-23 of Appendix A, the Court says:

> "While the (technological and economic) considerations Petitioner asserts in its petition for review are important ones needing resolution, they are not appropriate for judicial resolution but are essentially legislative judgments as to where the public interest lies . . .
>
> 'This is in essence a political question. The answer should be and, when the situation is grave enough, perhaps will be made in the legislative arena." (matter in parentheses added)

With respect to petitioner's claim that research and reports made known since June 30, 1972 demonstrate that sulfur dioxide is not the health hazard it was earlier thought to be, the Eighth Circuit held that this complaint should first be presented to the EPA for its consideration (p. 25 of Appendix A). This holding was not based upon the governing act of Congress, but was inferred from a part of the Report of the Senate Committee on Public Works accompanying S.4358—a Senate bill that was never enacted. See pp. 41-2 of Report No. 91-1196 issued September 17, 1970 by this Senate Committee of the 91st Congress, 2nd Session. The holding that the United States Court of Appeals of the District of Columbia is

the only Court that could judicially consider this post-promulgation ground has no support in either the Clean Air Act or any Congressional Report.

Referring to petitioner's claim that information made known since June 30, 1972, demonstrates that compliance with the sulfur regulation is not necessary to meet the national air standards in the St. Louis area the Eighth Circuit simply noted that state implementation standards may be stricter than Federal (p. 25 of Appendix A); although those stricter state standards also become Federal standards when approved by the EPA.

The upshot of the Eighth Circuit's decision is that the Section 307(b)(1) grant of power to the "appropriate circuit" to judicially review a federally approved implementation plan (on grounds arising more than 30 days after approval) does not mean a thing. We might note that violations by a corporation or individual of federally approved implementation plans are punishable by Federal District Courts with $25,000 to $50,000 fines per day of violation and/or imprisonment from one to two years. Section 113(c)(1) of the Clean Air Act Amendments (42 U.S.C. Sec. 1857c-8(c)(1)).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit in *Appalachian Power Co. v. Environmental Protection Agency*, 477 F(2) 495, at p. 505, and the Third Circuit in *St. Joe Minerals Corp. v. Environmental Protection Agency*, 508 F(2) 743, at p. 747, directly held that those courts must consider technological and economic factors in a Section 307(b)(1) proceeding.* Those two decisions are squarely in conflict with the instant decision of the Eighth Circuit.

In *Indiana & Michigan Electric Company v. Environmental Protection Agency*, 509 F(2) 839, at p. 845, the Seventh Circuit held that technological feasibility and economic impact arguments may be heard by the Federal District Court in an enforcement proceeding (thereby declining to follow the decision of the Third Circuit in the *Getty* case), and in *Buckeye Power Co. v. Environmental Protection Agency*, 481 F(2) 162, at p. 165, the Sixth Circuit held that impossibility claims of individual petitioners are "assertable as a defense in future federal or state enforcement proceedings." Those holdings are directly in conflict with the Eighth Circuit's assertion that no judicial review of such matters is permissible (pp. 22-23, Appendix A).

As the Eighth Circuit noted (pp. 20-23, Appendix A), it finds some support for its holding in decisions of the First, Fifth and Ninth Circuits—*South Terminal Corp. v. EPA*, 504 F(2) 646, at p. 675, *Texas v. EPA*, 499 F(2) 289, at p. 317, and *Natural Resources Defense Council, Inc. v. EPA*, 507 F (2) 905, at p. 914, respectively. However, the First Circuit did say that "Economic considerations may play some role" (504

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* The Third Circuit had previously so stated in dicta. *Getty Oil Co. v. Ruckleshaw*, 467 F(2) 349, at p. 357, cert. den. 409 U.S. 1125, 93 S. Ct. 937, 35 L. Ed. 256.

F(2) at p. 676), and it expressed considerable concern about technological feasibility (504 F(2) at p. 681).

This diversity of decisions of the various Circuit Courts of Appeal constitutes a substantial reason why certiorari should be granted.

The Eighth Circuit's holding that technological and economic considerations "are not appropriate for judicial resolution" (p. 22, Appendix A) constitutes an abdication of the judicial power granted to it by Article III of the United States Constitution. In addition that holding deprives petitioner of property without due process of law and constitutes a taking of private property for public use without just compensation in violation of the Fifth Amendment to such Constitution. Clearly serious students of our constitutional system are deeply concerned about the Eighth Circuit's holding that matters of such importance must finally be resolved by an ex parte declaration of an executive appointee, rather than by the testing of them in an adversary judicial proceeding.

The insertion by the Eighth Circuit into the Clean Air Act Amendments of a portion of a Senate Report* on an unenacted Senate Bill (pp. 23-24, Appendix A), as well as its attribution of review power solely to the D.C. Court of Appeals, constitutes a substantial departure from the accepted and usual course of judicial proceedings. Under Rule 19 of this Court that is also a consideration governing review on certiorari.

The decision of the United States Court of Appeals for the Eighth Circuit means that petitioner may have to shut down its largest generating plants to comply with Federal law. Since many other utilities are in a situation similar to petitioner they

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* Report 91-1196 of Senate Committee on Public Works accompanying S. 4358, 91st Congress, 2d Session (dated September 17, 1970)

might also, if the Eighth Circuit's decision is the correct one, have to shut down their generating plants. We respectfully submit that shutting down these plants for even a few days would affect the health of the people of the United States far more seriously than sulfur dioxide in the ambient air has effected their health in hundreds of years. As the Eighth Circuit itself noted (p. 22, Appendix A), this case presents problems of concern for "almost all citizens in this country."

For this reason, and the other reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 74-1614

Union Electric Company,
Petitioner,
v.
Environmental Protection Agency,
Respondent.

On Petition for Review of an Order of the Administrator of the Environmental Protection Agency.

Submitted: January 10, 1975

Filed: March 27, 1975

Before Gibson, Chief Judge, Heaney and Ross, Circuit Judges.

Gibson, Chief Judge.

Petitioner, Union Electric Company, asserts that because of cost factors it is impossible or in the alternative that it is manifestly against public interest for it to comply with emission control standards contained in the Missouri implementation plan approved by the Administrator of the Environmental Protection Agency (EPA), the Respondent herein. In this vital area of public power, Union Electric seeks relief from compliance with these standards by this original proceeding filed in this court pursuant to § 307(b)(1) of the Clean Air Act Amendments of

1970. This section allows consideration of a petition for review filed more than 30 days after the Administrator's approval or promulgation of a state implementation plan if such petition "is based solely on grounds arising after such 30th day."[1] While there have been many petitions filed challenging implementation plans within 30 days of the Administrator's approval,[2] so far as we know this is the first petition for review filed pursuant to § 307(b) after the initial 30 day period.[3]

At the outset we are confronted with the critical question of what are we to review. None of the contentions of the Petitioner have been presented to the Administrator nor have they been presented to the Missouri Air Conservation Commission for possible action, except in the limited manner discussed herein. We realize we are treading uncharted waters, and though sympathetic with the economic, technological and legal problems confronting the Petitioner, we hold for the reasons hereafter set forth that we lack jurisdiction to consider the issues raised in the petition for review.

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[1] Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970), provides as pertinent herein:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan * * * may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval or after such date if such petition is based solely on grounds arising after such 30th day.

[2] *See, e.g., Texas v. E.P.A.*, 499 F.2d 289 (5th Cir. 1974) (a consolidation of 25 separate petitions for review).

[3] The Ninth Circuit in *Kawasaki Motors Corp. v. Train*, No. 74-1697 (August 9, 1974), *cert. denied*, 43 U.S.L.W. 3448 (U.S., Feb. 18, 1975), an unreported order, granted the Administrator's motion to dismiss a petition for review of motorcycle use ban controls filed more than 30 days after their promulgation on the grounds that it lacked jurisdiction. Whether the petition for review in that case was untimely filed, or alleged grounds arising solely after the 30th day, is not disclosed in the report.

Background of This Litigation

The Administrator approved the Missouri implementation plan pursuant to § 110 of the 1970 Amendments[4] on May 31, 1972.[5] A portion of the approved implementation plan, Regulation X, § B, restricts the emission of sulfur dioxide into the ambient air. Union Electric Company operates three coal-burning electric power generating plants in the Greater St. Louis area that are subject to the sulfur dioxide restrictions contained in the Missouri implementation plan. It alleges that it cannot comply with these restrictions, short of shutting down the plants, an event which, in the Petitioner's words, would "result in an immediate cessation of civilized life as we know it."[6]

Petitioner has variance applications pending in various stages of the administrative process in the State of Missouri.[7] How-

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[4] 42 U.S.C. § 1857c-5 (1970).

[5] 37 Fed. Reg. 10875 (1972). *See also* 40 C.F.R. § 52.1320 *et seq.* (1974).

[6] Petitioner alleges that compliance with the sulfur dioxide emission standards is at this time impossible because removal equipment has not been technologically devised to operate successfully or satisfactorily, noting that such equipment has been installed at its Meramec plant and found to be unreliable and unsatisfactory. It further asserts that the cost of this unsatisfactory equipment for all of its plants would be $500 million and that the difficulty of raising that amount with regulatory bodies having to approve the issuance of bonds and the public market accepting the bonds is now insurmountable, even with vastly increased rates. In the alternative, it contends that the cost is so high in relation to the benefits that the public interest would be adversely affected.

[7] Missouri's Air Conservation Law, setting forth the powers and duties of the Missouri Air Conservation Commission, an intervenor herein, is located in Mo. Rev. Stat. § 203.010 *et seq.* (1969). Variance procedures are contained in § 203.110. A variance for the Meramec plant was denied by the St. Louis County Air Pollution Control Director and has been appealed to the St. Louis County Air Pollution Control Appeal Board. A variance for the Sioux plant expired on July 24, 1974, and Petitioner has requested an extension. No state action on a requested variance for the Labadie plant had been taken at the time of oral argument on this petition.

ever, while awaiting state decisions, Union Electric was notified on May 31, 1974, by the Administrator that its plants were in violation of the sulfur dioxide emission regulations. The present petition was filed August 18, 1974, requesting that we review that portion of the Missouri implementation plan approved by the Administrator which limits sulfur dioxide emissions. Our jurisdiction depends upon whether the grounds that Union Electric asserts in its petition for review arise solely after the initial 30 day period for seeking review.[8] The Respondent and Intervenors, State of Missouri and the Missouri Air Conservation Commission, have filed motions to dismiss the petition, contending that we lack jurisdiction.

The Statute

The Clean Air Act Amendments of 1970 were intended, as the preamble sets out, "to provide for a more effective program to improve the quality of the Nation's air." To accomplish this the Amendments set a timetable for reducing the pollution of the ambient air[9] to at least national standards set to assure

[8] The grounds in the petition alleged to arise solely after the initial 30 day period for seeking review are:

(1) The Arabian Oil Embargo and related economic factors resulting in a shortage of low sulfur coal and/or the high cost of obtaining it would be against the public interest;

(2) Sulfur dioxide removal equipment has not been developed;

(3) The price of sulfur dioxide removal equipment has increased to where its installation would cost in excess of $500 million;

(4) The impossibility of obtaining financing to purchase and install sulfur dioxide removal equipment;

(5) Sulfur dioxide has been shown not to be the medical hazard thought at the time of the promulgation of standards; and

(6) That compliance with Regulation S-X is not necessary to attain the national primary ambient air standards in the St. Louis metropolitan area.

[9] Ambient air has been defined by federal regulation to mean that portion of the atmosphere external to buildings to which the general public has access. 36 Fed. Reg. 22384 (1971).

the public health and welfare. National primary ambient air standards are set by the Administrator at levels he determines are requisite to protect the public health[10] and are required to be met within three years from the approval of a state implementation plan.[11] National secondary ambient air standards specify a level of air quality requisite to protect the public welfare[12] from known or anticipated adverse effects,[13] and are to be attained within a reasonable time.[14]

The scheme of the Amendments provides for strict federal oversight of state action to reach the mandated air quality goals. This interaction was summarized in *Natural Resources Defense Council, Inc. v. E.P.A.*, 483 F.2d 690, 691-92 (8th Cir. 1973):[15]

> The 1970 Amendments require each state to submit to the Administrator a plan for implementation, maintenance, and enforcement of the federal standards * * *. The plan must be designed to achieve *primary* standards as expeditiously as practicable, but in no case later than three years from the date of approval of such plan, and *secondary* standards within a reasonable time * * *. The Adminis-

[10] Sec. 109(b) (1), 42 U.S.C. § 1857c-4(b)(1) (1970).

[11] Sec. 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970).

[12] Welfare standards are to be established with reference to the "effects on soils, water, vegetation, man-made materials, animals, wildlife, visibility, climate, and economic values." S. Rep. No. 1196, 91st Cong., 2d Sess. 11 (1970) [hereinafter cited as *Senate Report*].

[13] Sec. 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970).

[14] Sec. 110(a)(2)(A)(ii), 42 U.S.C. § 1857c-5(a)(2)(A)(ii) (1970). Standards have been issued for carbon monoxide, hydrocarbons, photochemical oxidants, sulfur oxides, nitrogen dioxide and particulate matter. 36 Fed. Reg. 22384 (1971).

[15] For an extended discussion of the federal-state cooperation intended by the Amendments, see Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637 (1973).

> trator is to approve or disapprove each portion of the plan depending on whether it conforms with the prescribed deadlines for attainment of national standards and with other criteria set out in § 1857c-5(a)(2). If any plan or portion thereof fails to conform to statutory requirements, the Administrator ultimately is directed to promulgate such regulations as may be necessary to cure the deficiency[.] (emphasis in original, footnote omitted).

Upon approval or promulgation of a state implementation plan, the requirements thereof have the force and effect of federal law and may be enforced by the Administrator in federal courts.[16] The state may enforce its regulations through state proceedings,[17] and citizens' suits in limited circumstances were provided as an additional method of enforcement by Section 304.[18]

Jurisdiction

All the parties to this proceeding agree that if we have jurisdiction it must be by virtue of grounds solely arising after the 30 days from the Administrator's approval. This last phrase of § 307(b), unless we adopt a position that controverted allegations are sufficient to sustain jurisdiction, would require this

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[16] 42 U.S.C. § 1857c-8 (Supp. I, 1971), *amending* 42 U.S.C. § 1857c-8 (1970). A civil action for appropriate relief, including temporary or permanent injunction may be brought. Criminal penalties of up to $25,000 per day or imprisonment for up to one year attach to knowing violations of a plan requirement or EPA order after expiration of a thirty day notice period.

[17] It has been suggested that States could avail themselves of the citizen suit provisions of § 304 to obtain injunctive relief in the federal district courts. Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 662-64 (1973).

[18] 42 U.S.C. § 1857h-2 (1970).

court to engage in fact-finding as to whether the grounds arose solely after 30 days of approval to determine our jurisdiction. While the Courts of Appeals are not generally viewed as courts of original jurisdiction, we entertain no doubt but that Congress could, if it so chose, require that we engage in just such a fact-finding process, though our facilities for doing so are awkward and limited. Recognizing that the grounds it posits for review would require such a course, Union Electric contends that this was the intention of Congress and that we have inherent power to appoint a master to assist our resolution of disputed factual issues.[19] However, as such a course would be so far removed from the normal method of operation of an appellate court[20] and § 307(b)(1) speaks in terms of "review," we believe such an intention on the part of Congress should be manifestly clear before we undertake the course suggested by Petitioner.

Respondent EPA and the Intervenors argue, *inter alia*, that the grounds Union Electric asserts as a basis for review do not arise "solely" after the 30 day period. Yet, in the passing upon the motions to dismiss, we hesitate to rest our decision on that basis, for to do so would require us to engage in just that fact-finding process we are unsure was contemplated by Congress. We will thus assume for the determination of the question of

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[19] Such a power appears inherent and might also arise from Fed. R. Civ. P. Rule 53(a). We have in at least one instance, not arising under the statute in question, followed such a course. *N.L.R.B. v. Clinton Packing Co.*, No. 20,341 (8th Cir., filed Feb. 12, 1974). *See also N.L.R.B. v. Teamsters Local 282*, 438 F.2d 101 (2d Cir. 1971); *N.L.R.B. v. Remington Rand, Inc.*, 130 F.2d 919, 925-26 (2d Cir. 1942).

[20] *See South Terminal Corp. v. E.P.A.*, 504 F.2d 646, 665 (1st Cir. 1974):

> The normal way courts evaluate a technical issue is through proceedings attended by expert witnesses. Yet as an appellate court we cannot conduct such fact-finding proceedings on our own. Congress has not interposed a district court in the chain of review, so we cannot remand for clarifying findings of fact, based, perhaps, on testimony by Agency and private experts.

our jurisdiction that Union Electric's grounds for review do in fact arise solely after the initial 30 day period for review.

There is a certain measure of ambiguity in § 307(b)(1). The section speaks in terms of a petition for review, not an original proceeding. If we accept Union Electric's argument, there would be no record to review. EPA, the Intervenors, and amicus, Coalition for the Environment, assert that questions of economic and technological feasibility do not constitute grounds for review as that term is used in § 307. This position provides a compelling basis for rejection of several of the grounds asserted by Union Electric. However, as the potential grounds for review are not set out in the statute, we must look to the legislative history to determine whether this argument has merit.[21] Before consideration of the legislative history, it is necessary at this point to look to what the Administrator is required to do by statute, as it is his actions that we must review, and to establish what the standard of review of his action is under § 307(b)(1).

Duties of the Administrator

Our review under § 307 is only of the Administrator's action in approving or promulgating a state implementation plan. In determining whether to approve or disapprove a state implementation plan, the Administrator's discretion is limited by the clear terms of the Act. He *shall* approve any state implementation plan which meets the requirements of § 110(a)(2).[22] In addition, the fact that States may adopt and enforce emission standards and control strategies even more stringent than

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[21] We do so in recognition that:

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize.

Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 185-86 (1941).

[22] Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970) provides:

> The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing, and that—
>
> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard, as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan * * * and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including but not limited to, land-use and transportation controls;
>
> (C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;
>
> (D) it includes a procedure, meeting the requirements of paragraph (4) for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;
>
> (E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;
>
> (F) it provides (i) necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions, (iv) that such reports

the federal[23] serves to further limit the discretionary area of his authority to approve or disapprove an implementation plan.

The Administrator argues that as he cannot consider economic and technological feasibility in approving or disapproving implementation plans, Congress could not have intended to

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shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h-1 of this chapter, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

[23] Section 116, 42 U.S.C. § 1857d-1 (1970), provides:

Retention of State authority.

Except as otherwise provided in * * * this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting control of emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan * * * such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

See also Senate Report, supra note 12, at 10; Letter from Russell Train, Administrator of the EPA to Honorable Carl Albert, Speaker of the House, in U.S. Code Cong. & Admin. News 1817 (1974):

Neither the current program nor the proposed amendment would infringe on the important principle that States have the prerogative to adopt and enforce more stringent controls if they choose to do so.

allow these questions to be raised in a petition for review. In a similar vein, the Coalition for the Environment asserts that we are limited in our review to those matters which, had they been in existence and known to the Administrator at the time of his approval or promulgation of the implementation plan, would have prevented him from giving his approval.

Petitioner disputes the above contentions for two reasons. First, it argues that there is no more important consideration than an economic one that makes it impossible or manifestly against the public interest for it to comply with the regulations, and secondly, that grounds for review after the initial 30 day period exist whenever any "significant new information" affecting the Petitioner becomes available. Before attempting an answer to the above contentions we look first to our scope of review.

Scope of Review Under § 307

While many provisions of the Clean Air Act Amendments of 1970 were subjected to vigorous debate and disagreement in Congress, very little was said about judicial review. In the report accompanying the conference agreement, it is merely noted that the conference substitute "specifies the courts in which certain appeals may be prosecuted."[24] A Senate summary of the conference agreement recited that "[t]he agreement permits review of the standards, implementation plans, or other action taken pursuant to the Act."[25]

We think that our review of the Administrator's action in approving or disapproving an implementation plan is a narrow one, in which:

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[24] H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970), *reprinted in* U.S. Code Cong. & Admin. News 5374, 5389 (1970) [hereinafter cited as *Conference Report*].

[25] 116 Cong. Rec. 20,600 (daily ed. Dec. 18, 1970).

> [We] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted).

The one principle in the decided Clean Air Act cases upon which all the circuits have agreed is that review is limited to determining whether the Administrator's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] *See Natural Resources Defense Council, Inc. v. E.P.A.*, 507 F.2d 905 (9th Cir. 1974); *South Terminal Corp. v. E.P.A.*, 504 F.2d 646, 655-56 (1st Cir. 1974); *Texas v. E.P.A.*, 499 F.2d 289, 296-97 (5th Cir. 1974); *Buckeye Power, Inc. v. E.P.A.*, 481 F.2d 162, 170-71 (6th Cir. 1973); *Delaware Citizens for Clean Air, Inc. v. E.P.A.*, 480 F.2d 972, 975-76 (3d Cir. 1973); *Appalachian Power Co. v. E.P.A.*, 477 F.2d 495, 505-07 (4th Cir. 1973).

Before an intelligent determination of whether the Administrator's action represents a clear error of judgment could be made, it is necessary to know what the relevant factors are that the Administrator must consider in approving or promulgating an implementation plan. If Congress did not consider economic or technological considerations to be relevant to the Administrator's approval, even should significant new information relating to these considerations arise solely after the 30th day, they would not properly be considered upon a petition for review of

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[26] 5 U.S.C. § 706(2)(A) (1970); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

the Administrator's action. As we earlier noted, the statute itself provides limited guidance.[27]

However, we are mindful that:

> Statutes * * * are not inert exercises in literary composition. They are instruments of government, and in construing them "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." This is so because the purpose of an enactment is embedded in its words even though it is not always pendantically expressed in words. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, or, as Judge Learned Hand has put it, the art of interpretation is "the art of proliferating a purpose."

United States v. Shirey, 359 U.S. 255, 260-61 (1958) (citations omitted).

The legislative history of the amendments does provide an insight into the intent of Congress and what factors it was concerned with in enacting a review provision.

Legislative History of § 307

A bill to amend the Clean Air Act of 1967 passed the House in June, 1970. Included in several sections of that bill, including Sec. 108(c)(4) dealing with enforcement and judicial review,[28] was language indicating that the economic and tech-

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[27] *See* Section 111(a)(1), 42 U.S.C. § 1857c-6(a)(1) (Supp. I, 1971), *amending* 42 U.S.C. § 1857c-6(a)(1) (1970). This is the only section of the 1970 Amendments that indicates that the Administrator is to take into account cost considerations, and it applies only to the issuance of standards of performance for *new* sources. Inferentially, if cost considerations were to be taken into account in approving implementation plans, such an intention would be expressed in the statute.

[28] *See* H.R. Rep. No. 1146, 91st Cong., 2d Sess. (1970), *reprinted in* U.S. Code Cong. & Admin. News 5356, 5364 (1970).

nological feasibility of compliance was to be a consideration under the Act. The Senate bill was passed in September, 1970, and came after smog blanketed the east coast of the country in July. The timing of that smog attack was reflected in the stricter provisions of the Senate bill, which except for new source performance standards, included no language that would indicate a concern for economic or technological feasibility. To the contrary, the *Senate Report, supra* note 12, at 2-3, states:

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with the application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down, and in addition that new sources should be controlled to the maximum extent possible to prevent atmospheric emissions.

That this was the deliberate intention of the Senate sponsors was manifested during the floor debates.[29] The final form of the

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[29] *See* 116 Cong. Rec. 16,091-96 (daily ed. Sept. 21, 1970) (remarks of Senator Muskie):

> These five sets of requirements will be difficult to meet. But the committee is convinced that industry can make compliance with them possible or impossible.
>
> * * * * * * * *
>
> It is not necessary to say that any company is going to be closed on January 1, 1975, but it is necessary for the Congress to say that they must meet the standards until the Congress itself decides otherwise. That is what we are asking. Five years is a long time for the companies to make their effort, then

bill passed by both houses was worked out in conference. Although the conference agreement was technically a House bill, it is clear that the stronger Senate version prevailed in conference.[30]

It is clear that Congress intended to preclude economic and technological factors from the Administrator's consideration

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> to make their case and then for Congress to consider a change of policy.
>
> * * * * * * * *
>
> The deadline is based not, I repeat, on economic and technical feasibility, but on considerations of public health. * * * If the industry cannot meet it, they can come back.
>
> * * * * * * * *
>
> * * * What we are talking about is very clear and simple. We are saying that Congress, in the interest of public health, should say to the country and to the industry that this is what the health requires. Then industry should go to work over the next 5 years to either make it possible or, if it proves to be impossible, ask Congress to change the policy.

[30] *Conference Report, supra* note 24; 116 Cong. Rec. 20,597 (daily ed. Dec. 18, 1970) (remarks of Senator Muskie); 116 Cong. Rec. 12,058-59 (daily ed. Dec. 18, 1970) (remarks of Representative Staggers); 116 Cong. Rec. 12,063 (daily ed. Dec. 18, 1970) (remarks of Representative Vanik).

Although subsequently expressed intention is not necessarily a reliable guide to Congressional intent at the time of passage, the following statement of Senator Eagleton, a Senate conferee on the 1970 Amendments, is instructive as to the conference agreement:

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> "Giving due consideration to economic and technological feasibility of compliance."
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of pubilc health was concerned.

Hearings on Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 2d Sess., pt. 1 at 21 (1972) [hereinafter cited as *1972 Subcom. Hearings*].

of whether to approve an implementation plan. Even if these grounds are considered by the Administrator, the mandatory and directory language of § 110(a)(2) would preclude using such grounds as a basis for setting aside his action on a petition for review under § 307(b)(1).

The *Senate Report, supra,* note 12, at 36, states that "[t]hese matters [technological or other considerations] would have been settled in the administrative procedure leading to an implementation plan or emission control provision." Reference to the "administrative procedure" is revealing. State action on adopting an implementation plan can only be taken after public hearings held upon reasonable notice. Congress left it to the States to determine economic and technological questions so long as the state's plan would attain the national standards. The Administrator's determination to approve or reject the state plan is to be made, not on what might be called the legislative decisions made by the States, but on whether the means adopted by the implementation plan are sufficient to assure that the national standards will be met within the mandated timetable.

As each State was free, within the federal standards, to adopt its own plan for meeting the challenge of reducing air pollution, it is appropriate that the making of decisions as to what would be required in terms of economic cost and technological innovation were left to the States.[31] These decisions were left by the Congress to the States and are not to be reviewed by means of a § 307 petition.

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[31] *See Requirements for Preparation, Adoption, and Submittal of Implementation Plans* [hereinafter cited as *EPA Guidelines*], 40 C.F.R. § 51.2 (1972):

> Nothing in this part shall be construed in any manner:
>
> * * *
>
> (d) To encourage a State to prepare, adopt, or submit a plan without taking into consideration the social and economic impact of the control strategy set forth in such plan, including, but not limited to, impact on availability of fuels, energy, transportation, and employment.

This portion of the *EPA Guidelines* was subjected to intensive scrutiny in the *1972 Subcomm. Hearings, supra* note 30, at 18-23, 276-77, 307-08, 312-13. It has also been cirticized as being an inappropriate concern in light of the expressed Congressional unwillingness to sacrifice the public health and welfare to economic exigencies. Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic,* 61 Geo. L. J. 153, 179-80 (1972).

Such a criticism seems unwarranted in view of the Congressional recognition that economic decisions would be left to and required of the States. *See* 116 Cong. Rec. 16,107 (daily ed. Sept. 21, 1970) (remarks of Senator Cooper):

> And these [state implementation] plans must accomplish the air quality standards within 3 years. It is at this point that States and communities must make economic decisions, and decisions on the future growth of their areas and the kind of life they want, in considering alternative means of achieving clean air.

See also, South Terminal Corp. v. E.P.A., 504 F.2d 646, 676 n. 33 (1st Cir. 1974); *1972 Subcomm. Hearings, supra* note 30, at 312 (Memorandum of Ass't General Counsel of EPA):

> It was expected that, at the [state] hearings, persons responsible for adoption of the plan would be made aware of the feasibility and impact of various possible strategies on all segments of the public. To expect States to evaluate the impact of various alternatives open to them without considering the economic and social impact of their decisions would deprive them of the flexibility and initiative Congress intended that they retain.

Cases Arising Under § 307

While this a case of first impression, we must reject Petitioner's contention that cases dealing with petitions for review filed within 30 days have only a collateral interest. We are convinced that only matters which, if known to the Administrator at the time of his action, would justify setting aside that action are properly reviewable after the initial 30 day review period. We must admit that the prior case law is not entirely consistent with our conclusion.

Petitioner's contention that economic and technological factors can be asserted in a petition for review is not without support.

In *Buckeye Power, Inc. v. E.P.A.*, 481 F.2d 162 (6th Cir. 1973), the court found EPA's argument that technological infeasibility, high cost-benefit ratios, and resource availability are irrelevant under the 1970 Amendments devoid of merit. That decision was premised in part, however, on the legislative history of the House bill, giving little weight to the Senate pronouncements that such considerations were irrelevant. As we have previously indicated, it was the stricter Senate version that was adopted, although carrying the label of the House bill. Moreover, the court in *Buckeye Power* went on to hold that review of petitioners' claims of economic and technological infeasibility of compliance could not be obtained in a § 307 (b) (1) review proceeding, but would be available as defenses in federal or state enforcement proceedings.

More favorable to Union Electric is the decision in *Appalachian Power Co. v. E.P.A.*, 477 F.2d 495 (4th Cir. 1973). Therein, the Fourth Circuit indicated that an evaluation by the Administrator of the economic and technological feasibility of state implementation plans is appropriate since he must determine whether the proposed plan is practicable and reasonably likely to achieve the results required under the Amendments. As the court is to engage in a "substantial inquiry" into the reasonableness of agency action, such a review would apparently extend to determining whether the Administrator's approval of a plan challenged as economically or technically unreasonable was based upon consideration of all relevant factors, including economic or technical ones.

In *Duquesne Light Co. v. E.P.A.*, 481 F.2d 1 (3d Cir. 1973), the court faced a timely challenge to the Administrator's approval of Pennsylvania's implementation plan on the ground of its unreasonable requirements. The companies involved therein were also pursuing state variance procedures, the course advocated by the EPA in the present case.[32] Without determining

[32] State variance procedures would afford little relief to Union Electric in the present case as we have held that after the federal compliance date for attainment of national primary standards (June 1, 1975, for the St. Louis area), 37 Fed. Reg. 10876-77 (1971), variances may not be granted. *Natural Resources Defense Council, Inc. v. E.P.A.*, 483 F.2d 690 (8th Cir. 1973). *Accord, Natural Resources Defense Council, Inc. v. E.P.A.*, 478 F.2d 875 (1st Cir. 1973); *see Natural Resources Defense Council, Inc. v. E.P.A.*, 489 F.2d 390, 401-03 (5th Cir. 1974) (only remedy is a postponement of standards by application of Governor). *But see Natural Resources Defense Council, Inc. v. E.P.A.*, 507 F.2d 905 (9th Cir. 1974) (minor variances may be granted in both pre- and post-attainment stages).

whether the Administrator's approval was reasonable, the court did afford a measure of relief. It held that the EPA must either (1) refrain from imposing penalties during the pendency of the state administrative procedures or (2) grant the companies a limited *legislative* hearing in which the companies could attack the economic or technical infeasibility of the implementation plan.[33] The Third Circuit also held in a pre-enforcement challenge not brought pursuant to § 307(b)(1) that questions of economic hardship or lack of compelling necessity should have been raised in a § 307(b) proceeding. *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

Getty Oil is instructive as it illuminates, in part, the dilemma faced by Petitioner. Getty did not challenge the Administrator's approval of the Delaware implementation plan in a § 307(b) proceeding, but instead sought an administrative variance from the State. When this was denied, Getty sought and obtained an injunction in state court against enforcement of the objectionable provisions of the state plan. Such an injunction did not bind the EPA, however, and the EPA commenced enforcement action based upon the provisions of the state plan unenforceable by the

[33] Recognizing as it did so that it was "operating on the frontiers of legal thought, and any advance post that we take up is liable to the dangers of heavy ground assault. But it is only by such expeditions that knowledge of the terrain ahead may be gained." *Duquesne Light Co., supra* at 10-11 n. 49.

State. Getty sought relief in the federal courts and was denied upon the basis that the only remedy available to challenge the approved implementation plan was § 307(b)(1).

In *Getty Oil* economic hardship was viewed as a ground to support a petition for review. However, as we have previously indicated, we do not think this question is one reviewable in a § 307(b) proceeding. Our reading of the statute finds support in the First, Fifth and Ninth Circuits. The *First Circuit in South Terminal Corp. v. E.P.A.*, 504 F.2d 646, 675 (1st Cir. 1974), took the position that economic and social impacts of an implementation plan are not sufficient reasons to reject measures that would insure compliance with primary air quality standards.[34]

The Fifth Circuit was faced with a challenge to the technological feasibility of hydrocarbon emission regulations in *Texas v. E.P.A.*, 499 F.2d 289 (5th Cir. 1974). In finding the petitioners' concerns not a basis for attack under § 307(b)(1), the court noted:

> There is no basis whatever in the record for concluding that a compliance date of May 31, 1975 is technologically feasible, and it may well be that this requirement must be postponed. However, we do not believe that this fact makes the regulation arbitrary or capricious, for 42

[34] *South Terminal Corp., supra* at 675:

> The material portions of the Clean Air Act itself do not mention economic or social impact, and it seems plain that Congress intended the Administrator to enforce compliance with air quality standards even if the costs are great. Particularly in the case of primary standards—those set as "requisite to public health"—Congress' position is not extreme or unprecedented. Minimum public health requirements are often, perhaps usually, set without consideration of other economic impact. * * * Congress has already made a judgment the other way, and EPA and the courts are bound.

See also Natural Resources Defense Council, Inc. v. E.P.A., 478 F. 2d 875, 888-89 (1st Cir. 1973).

> U.S.C.A. § 1857c-5(f) contemplates plans which require control measures of less than certain technological feasibility. That section specifies procedures for obtaining a postponement of compliance dates for particular sources, and it is through those procedures that petitioners must seek relief.

Texas v. E.P.A., supra at 317.

The postponement procedure mentioned by the Fifth Circuit is that provided in § 110(f)(1)[35] wherein the Governor of the state to which the provisions of the implementation plan applies may request postponement of an emissions limitation for a period not to exceed one year.

The Ninth Circuit has also noted that questions of economic or technological feasibility are not concerns of the 1970 Amendments. *See Natural Resources Defense Council, Inc. v. E.P.A.*, 507 F.2d 905, 914 (9th Cir. 1974):

[35] 42 U.S.C. § 1857c-5(f)(1) (1970). That section provides:

> Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—
>
> (A) good faith efforts have been made to comply with such requirement before such date,
>
> (B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,
>
> (C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and
>
> (D) the continued operation of such source is essential to national security or to the public health or welfare,
>
> then the Administrator shall grant a postponement of such requirement.

> [R]eferences in the reports and debates clearly evince a legislative intent to realize national ambient air standards despite economic cost and in spite of the possibility that some business enterprises, unable to comply with a state's plan so as to enable that state to attain national standards within the prescribed time period, might have to terminate operations. (footnote omitted.)

And lastly it should be noted that this court, in adopting the reasoning and remedy of the First Circuit in *Natural Resources Defense Council, Inc. v. E.P.A.*, 478 F.2d 875 (1st Cir. 1973), in a challenge to the Iowa implementation plan approved the position that economic hardship is insufficient to support a state variance in the post-attainment period. *Natural Resources Defense Council, Inc. v. E.P.A.*, 483 F.2d 690, 693-94 (8th Cir. 1973).

We conclude that economic and technological considerations do not afford a basis for our review under § 307(b); therefore, even if Grounds 1 through 4 alleged by Union Electric, *supra*, note 8, could be shown to have arisen more than 30 days after the Administrator's approval of the Missouri implementation plan, they would not provide a basis for setting that approval aside.

While the considerations Petitioner asserts in its petition for review are important ones needing resolution, they are not appropriate for judicial resolution but are essentially legislative judgments as to where the public interest lies. Whether the public interest would be best served by closing plants or by allowing some variances from the national program for clean air we cannot say. This is, of course, a current concern of Petitioner as well as of almost all citizens in this country. However, the statement of this concern does not thereby render it into one capable of judicial resolution.

This is in essence a political question. The answer should be and, when the situation is grave enough, perhaps will be made in the legislative arena. It is not our role to sit as a super-legislature balancing the necessity of compliance with the clean air standards against competing economic and technological considerations.

We do not, however, read the provision for review in § 307 (b) as a nullity. Congress must have intended that some grounds arising after the initial 30-day period could provide grounds for review. The *Senate Report* at 41-42 in discussing the review provisions of § 307 stated:

> The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, or approved or promulgated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.
>
> New information may become available at some future date which indicates that a particular pollution agent or combination of agents is hazardous to the health of persons and therefore should be added to those pollution agents subject to the provisions of section 115. Conversely, new information may become available indicating that a pollution agent for which a prohibition had been established under section 115 is not hazardous to

> the health of persons. If the [Administrator] failed to act in either event, the promulgation could be challenged.

We believe that the significant new information to which Congress referred must relate to the protection of the public health or environmental quality, not to new information relating to technological innovation or lack thereof, or to cost increases not foreseen at the time of the Administrator's approval of the implementation plan and thus not asserted in a petition for review within 30 days.

The theme of the 1970 Amendments is the protection of the public health and welfare, notwithstanding the serious cost and technological obstacles. While information that indicates that a certain pollutant is not a health hazard or is a greater one than originally thought is significant new information that Congress indicated should be considered and acted upon by the Administrator, no similar indication appears for matters of cost or technology. Our interpretation is also more consonant with the ordinary meaning of "review"—the term used in § 307—and would not require a fact-finding procedure at the appellate level. The *Senate Report* indicates that it is only when the Administrator fails to act upon the basis of the new information that review is proper under § 307, implying that the information would have to be brought to the Administrator's attention. The petition for review in this circumstance would be a challenge to the Administrator's action and would require a scrutiny of the adminisrative record available to the Administrator to determine whether a clear error of judgment had been shown. It would not require that this court in the first instance develop a record on the challenge. The aforegoing interpretation is consistent with the statutory scheme and preserves the provision in § 307 for review after 30 days without creating a nullity.

Ground No. 5 set forth in Union Electric's petition, see note 8, *supra*, alleges that sulfur dioxide is not the health

hazard once thought. Under our interpretation of § 307 this ground would be sufficient to sustain a petition for review under § 307. This does not mean, however, that it is properly presented in the present petition. First, there is no indication that this objection has been brought to the Administrator's attention. It is only when the Administrator fails to act upon the basis of the new information presented to him that a petition for review is proper. Moreover, this challenge is to a national standard and as such must be filed in the District of Columia Circuit.[36]

Although any national revision of a primary or secondary standard would require a corresponding revision in the Missouri implementation plan,[37] limited of course by the State's right to set standards even more stringent that the federal if it desires, we do not have jurisdiction over a challenge to the Administrator's action as it relates to national standards.

The last ground posited to sustain jurisdiction is that information developed since June 30, 1972, has shown that Union Electric's compliance with the sulfur dioxide emission regulation is not necessary to attain national air quality standards in the St. Louis area. This contention does not furnish grounds for review of the Administrator's approval of the Missouri plan. As we have previously noted, the States are free to adopt limitations even stricter than the federal, and it cannot be contended that the States are limited in their implementation plans to doing no more than assuring that

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[36] Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970), provides as pertinent:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard * * * may be filed in the United States Court of Appeals for the District of Columbia.

[37] Sec. 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H) (1970).

the national standards are to be met and maintained.[38] They may also be required to assure the nondegradation of air quality which exceeds the national standards.[39]

We therefore hold that we are without jurisdiction to consider the claims raised by Union Electric in its petition for review. Accordingly, the motions to dismiss the petition filed by the EPA and Intervenors, State of Missouri and the Missouri Air Conservation Commission, will be granted.

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[38] *See* H.R. Conf. Rep. No. 1085, 93d Cong. 2d Sess. (1974), *reprinted in* U.S. Code Cong. & Admin. News 1820, 1831 (1974), re the Energy Supply and Environmental Coordination Act of 1974:

> Moreover, enforcement of any such requirement [source emission regulation] should not be made contingent upon a showing that the national primary standard is being exceeded at any place or time. This is not required under the Clean Air Act, as amended in 1970; nor is it required here.

[39] *See Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), *aff'd per curiam*, No. 72-1528 (D.C. Cir. Nov. 1, 1972), *aff'd by an equally divided court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973) (per curiam). *See also 1972 Subcomm. Hearings, supra* note 30 at 18, 20-21.

APPENDIX B

Judgment

United States Court of Appeals
for the Eighth Circuit

No. 74-1614 September Term, 1974

Union Electric Company, a Missouri Corporation, Petitioner, vs. Environmental Protection Agency, an Agency of the United States of America, Respondent.	On Petition for Review of an Order of the Administrator of the Environmental Protection Agency.

This cause came on to be heard on petition for review of an order of the Administrator of the Environmental Protection Agency and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that said petition be and the same is hereby dismissed in accordance with the opinion of this Court.

March 27, 1975

APPENDIX C

Section 307(b)(1) of the Clean Air Act Amendments (42 U.S.C. Sec. 1857h-5(b)(1)) says:

> "A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."*

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* Of course references to the appropriate sections in Title 42 of the United States Code are different from the quoted section references, which are made to the Clean Air Act Amendments.

Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 9, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

INDEX

Page

Relevant Docket Entries in the U. S. Court of Appeals, Eighth Circuit 1

Petition of Union Electric Company for Review of a Part of the Missouri Air Pollution Control Implementation Plan 2

Order of U. S. Court of Appeals, Eighth Circuit, Directing Briefs on Subject Matter Jurisdiction 9

Motion of Intervenor-Respondents to Dismiss 10

Motion of Respondent Environmental Protection Agency to Dismiss 12

Motion of Petitioner Union Electric Company for Leave to Amend Its Petition 13

Order of Court Granting Petitioner's Motion for Leave to Amend Its Petition 15

Note: The opinion of the United States Court of Appeals, Eighth Circuit, is printed on pages A-1 through A-26 of Appendix A to the Petition for Certiorari and the judgment of such Court is printed in Appendix B, page A-27 of such Petition.

In the
United States Court of Appeals
For the Eighth Circuit

No. 74-1614

Union Electric Company,
Petitioner,
v.
Environmental Protection Agency,
Respondent.

RELEVANT DOCKET ENTRIES

1974

August 19. Petition of Union Electric Company for review of a part of the Missouri Air Pollution Control Implementation Plan filed.

September 9. Court orders briefs on its subject matter jurisdiction.

September 12. Motion of State of Missouri and Missouri Air Conservation Commission to intervene filed.

September 30. Court enters order sustaining the motion to intervene.

October 31. Motion to dismiss filed by Intervenor-Respondents.

November 14. Motion to dismiss filed by Respondent.

December 2. Petitioner files a motion to amend its petition.

December 31. Court enters order sustaining motion to amend petition.

1975

January 10. Case argued and submitted before Judges Gibson, Heaney & Ross.

March 27. Opinion by Judge Gibson and judgment of Court dismissing petition filed. (opinion printed on pages A-1 through A-26 and judgment printed on page A-27 of Appendices to Petition for Certiorari)

In the
United States Court of Appeals
For the Eighth Circuit

(Title omitted in printing)

PETITION
For the Review of a Part of the Missouri Air Pollution Control Implementation Plan
(Filed August 19, 1974)
General Allegations

1. This is a petition for review of the provisions of Section B, Regulation X of the Air Quality Standards and Air Pollution Control Regulations of the St. Louis Metropolitan Area and other provisions of the Missouri law and St. Louis County ordinances relating thereto, both as those provisions fall within the jurisdiction of the Missouri Air Conservation Commission for the Missouri Counties of Franklin, St. Charles and Jefferson and within the jurisdiction of the Department of Community Health and Medical Care, Air Pollution Control Branch, of St. Louis County, Missouri.

2. Regulation X applies to the "Restriction of Emissions of Sulphur Dioxide from Use of Fuel" and Section B thereof applies to "Restriction Applicable to Fuel Burning Installations with a Capacity of 2,000 Million or More British Thermal Units Per Hour."

3. Section B of Regulation X, along with other provisions of said Missouri Air Pollution Control Regulations, were approved as a state implementation plan by the Administrator of the Respondent Environmental Protection Agency on May 31, 1972. 37 Fed. Reg. No. 105, Part 3. Such approval was effected pursuant to Section 110 of the Federal Clean Air Act as amended. 42 USC Sec. 1857c-5.

Parties

4. The Petitioner Union Electric Company is a Missouri corporation with its principal and registered office at 1901 Gratiot Street, St. Louis, Missouri 63103. It now is, and for many years has been, engaged in the business, among others, of generating, transmitting, distributing and selling electrical power and energy in central and eastern Missouri (including the St. Louis Metropolitan Area), western Illinois and southeastern Iowa. It is a public utility subject to the jurisdiction of the Missouri Public Service Commission, the Illinois Commerce Commssion, the Iowa State Commerce Commission and the Federal Power Commission. It and its utility subsidiaries (which obtain the bulk of their electricity from it) serve approximately 848,000 customers in an area of 19,200 square miles with an estimated population of 2,500,000.

5. Petitioner owns and operates coal fired generating plants in the Missouri Counties of Franklin (the Labadie Plant), St. Charles (the Sioux Plant) and St. Louis (the Meramec Plant). Those three plants produce about 87% of Petitioner's kilowatt hour output.

6. Respondent Environmental Protection Agency is an agency of the United States of America with its principal office at 401 M Street, S.W., Washington, D.C. 20460. Region VII of such Agency, wherein Petitioner is located, has its offices at 1735 Baltimore, Kansas City, Missouri 64108. The Administrator of the Agency is Russell E. Train and the Regional Administrator for Region VII is Jerome H. Svore. The Agency and particularly its Administrator are charged with the enforcement of the Clean Air Act as amended. (42 USC Sec. 1857 et seq.).

Jurisdiction

7. This petition is filed in this Court pursuant to the provisions of subparagraph (b)(1) of Section 307 of the Clean Air Act as amended. 42 USC Sec. 1857h-5(b)(1). The pertinent part of that subparagraph says that:

> "A petition for review of the administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval or after such date if such petition is based solely on grounds arising after such 30th day."

8. Since a part of the Missouri implementation plan is being subjected to review in this case and since all of petitioner's generating plants previously referred to and its principal and registered offices are located in Missouri, the 8th Circuit, which includes Missouri, is the "appropriate circuit".

9. As we hereafter allege more fully, this petition is based solely on grounds arising after June 30, 1972, which was the 30th day following the Administrator's approval of the Missouri implementation plan.

Status of Variance Requests and Notice of Violation

10. The Missouri Air Conservation Law, which applies to the Labadie and Sioux Plants, includes a provision for the granting of variances (Sec. 203.110, R.S.Mo. 1969); and the St. Louis County Air Pollution Code, which applies to the Meramec Plant, also includes a provision for granting variances (Sec. 612.080 of St. Louis County Code).

11. These provisions constitute a part of the Missouri Implementation Plan which was approved by Respondent's Administrator on May 31, 1972 (37 Fed. Reg. No. 105, Part 3).

12. The Air Pollution Control Director of St. Louis County recommended that a variance for the Meramec Plant from the requirements of Section B, Regulation X, be denied and Petitioner has appealed that denial to the St. Louis County Air Pollution Control Appeal Board.

13. A variance from Section B for the Sioux Plant, which was granted by the Missouri Air Conservation Commission, expired on July 24, 1974. However, Petitioner has requested that said variance be extended.

14. Petitioner has requested a variance from Section B for its Labadie Plant. However, the Missouri Air Conservation Commission to which the request was made has not acted on it.

15. By letter dated May 31, 1974, the Respondent notified Petitioner that sulfur dioxide emissions from the Labadie, Sioux and Meramec Plants violated the requirements of Section B, which section constitutes a part of the "federally-approved implementation plan applicable to the air quality control region in which the Labadie, Meramec and Sioux Power Plants are located".

Results of (a) Failure to Comply and (b) Compliance by Closing Plants

16. Petitioner could comply with the notice of violation by shutting down its Labadie, Sioux and Meramec Plants. However, as we previously alleged, those plants supply the major part of Petitioner's electric load. Since it would be impossible to supply electrical service to Petitioner's customers for any

length of time (or under some circumstances even for a second) from other sources, there would soon be a discontinuance of electric service to large numbers of persons in the middle west. This would result in an immediate cessation of civilized life as we know it in that part of the country. And this would, of course, be a national catastrophe.

17. Section 113(c) of the Clean Air Act as amended (42 USC Sec. 1857c-8(c)) provides for a fine of not more than $25,000 per day of violation and, after the first conviction, a fine of not more than $50,000 per day. The Act is not clear as to whether the fine should be imposed on a per plant or per company basis. In any event it is obvious that the fine could run into large sums.

18. We believe and allege that the financial burden of such a fine would be so great that it would be impossible for Petitioner to continue obtaining (through short term loans or long term financings) the funds necessary for it to remain solvent and continue in business.

19. Petitioner's First Mortgage and Deed of Trust under which $773,000,000 in principal amount of its bonds are now outstanding states that failure of Petitioner to comply with valid governmental orders (such as a valid order of Respondent's administrator concerning emissions from its power plants) may become an event of default and make all such bonds callable. It is obvious that calling all such bonds would result in immediate bankruptcy of Petitioner.

Grounds Arising Since June 30, 1972, Demonstrate That Compliance by Petitioner Is Impossible or, in the Alternative, Manifestly Against the Public Interest

20. The only way it could be contended that Petitioner might be able to comply with the Sulfur Dioxide emission requirement of Section B is by burning low sulfur coal or by the installation of sulfur dioxide removal equipment at its plants. Additionally, there is serious doubt whether low sulfur coal can be utilized at the Sioux plant.

21. The Arabian Oil Embargo and related economic factors, which occurred after June 30, 1972, have resulted in such a shortage of, and a high price for, low sulfur coal that it is impossible for Petitioner to obtain it in sufficient quantities to comply with said Section B; or, in the alternative, the cost of such fuel (and the resulting price of electricity) would be so high, if the fuel could be obtained, that it would be manifestly against the public interest to purchase it.

22. Since June 30, 1972, it has been demonstrated that sulfur dioxide removal equipment, which would enable Petitioner to comply with Section B, has not been developed or invented.

23. Since June 30, 1972, the price of the sulfur dioxide removal equipment, even in its present unproven state of development, has increased so much that its installation at Petitioner's Labadie, Sioux and Meramec Plants would cost more than $500,000,000.

24. Due to the unreliability and high price of sulfur dioxide removal equipment, we allege and believe that the Commissions regulating Petitioner would not approve as a prudent investment the financing necessary to obtain funds required to install it. We further allege and believe that if the Commissions were to permit such financing, the factors enumerated above, as well as other economic factors occurring since June 30, 1972, would make it impossible to sell such securities. Alternatively, we allege and believe, due to economic and other factors occurring since June 30, 1972, that the carrying, operating and maintenance cost of sulfur dioxide

removal equipment, if installed, would be more than $120,-000,000 per annum, and we allege and believe that the resulting increase in the price of electricity would be manifestly against the public interest.

25. We believe and allege that research and reports made known since June 30, 1972, disclose that Sulfur Dioxide in the ambient air does not constitute the medical hazard that it was once thought to constitute and that this should now be fully considered in a proceeding questioning the legality of the Section B Sulfur Dioxide emission regulations.

26. We believe and allege that compliance with said Section B at Petitioner's three plants is not necessary for the fulfillment of the national primary ambient air quality standards promulgated by Respondent's Administrator for the St. Louis Metropolitan Area. We further allege and believe that this factor, along with the other factors we have mentioned above, should be considered in determining whether any further "attempt" should be made to achieve a compliance with Section B.

Wherefore, Petitioner prays:

1. That this Court take jurisdiction and determine first whether the matters alleged herein should be considered and decided by it in a proceeding under Section 307(b)(1) of the Clean Air Act as amended (42 USC Sec. 1857h-5(b)(1)).

2. That in the event this Court determines that it should hear and decide such matters, it appoint a Master to take evidence and on the basis of the evidence so taken, that it find and determine that Section B of Regulation X is void and of no effect as applied to Petitioner's Labadie, Sioux and Meramec Plants, and

3. That this Court grant such other and further relief as it may deem proper in the premises.

KEEFE, SCHLAFLY, GRIESEDIECK & FERRELL

By s/ WILLIAM H. FERRELL and
s/ CHARLES G. SIEBERT
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(Certificate of service omitted in printing)

In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

COURT ORDER OF SEPTEMBER 9, 1974
Directing Briefs on Its Subject Matter Jurisdiction

This petition is ordered filed for the purpose of considering whether this court has subject matter jurisdiction.

The petitioner is to submit a brief in support of our jurisdiction within ten days from the date of this order. The brief may

be in typewritten form, on letter-size paper, fastened in the left margin. The brief is not to exceed thirty typewritten pages. An original and three copies are to be filed with the clerk of this court and additional copies served on counsel for respondent.

The respondent is directed to file a similar typewritten response to petitioner's brief within ten days of such filing with the respondent's brief also directed to our subject matter jurisdiction.

The parties are requested, assuming *arguendo* that we have jurisdiction, to advise the court of their suggestions as to the procedures to be followed in securing a resolution on the merits.

In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

INTERVENOR-RESPONDENTS MOTION TO DISMISS

(Filed September 12, 1974)

Come now intervenor-respondents, John C. Danforth, Attorney General of Missouri, and the Missouri Air Conservation Commission, and move the court to dismiss the above case for the following reasons:

1. The petition fails to state a claim upon which relief can be granted. The standard of review applicable to this case is whether the action of the agency (EPA) in approving the Missouri implementation plan was "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law." *Delaware Citizens for Clean Air, Inc. v. EPA*, 480 F.2d 972 (3d Cir. 1973); *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875 (1st Cir. 1973). The ultimate standard is whether the agency has committed a "clear error of judgment". *Delaware Citizens for Clean Air, Inc. v. EPA, supra; Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). Petitioner has failed to allege any act on the part of EPA constituting a violation of the above standards, and has thus failed to state a claim upon which relief can be granted.

2. Primary jurisdiction over the issues raised by the petition lies in the MACC. See Brief on Jurisdiction, pp. 5-10, filed by intervenor-respondents herewith.

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In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

RESPONDENT'S MOTION TO DISMISS

(Filed November 14, 1974)

Respondent, Environmental Protection Agency, moves this Court, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rule 9 of the Rules for the United States Court of Appeals for the Eighth Circuit, to dismiss the Petition for Review filed by Union Electric Company on the ground that this Court lacks jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. Sec. 1857h-5(b)(1).

Respectfully submitted

by s/ THOMAS A. PURSLEY, III
Attorney, Department of Justice
Washington, D.C. 20530
Attorney for Respondent

(Certificate of service omitted in printing)

In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

MOTION OF PETITIONER UNION ELECTRIC COMPANY FOR LEAVE TO AMEND PETITION

(Filed December 2, 1974)

Petitioner Union Electric Company moves this Court for leave to amend its petition in the following two respects:

1. By deleting therefrom in its entirety the following sentence, which is the last sentence in paragraph 20 on page 5:

> "Additionally there is serious doubt whether low sulfur coal can be utilized at the Sioux Plant;" and

2. By deleting therefrom the first sentence in paragraph 26 on page 7, which says:

> "We believe and allege that compliance with said Section B at Petitioner's three plants is not necessary for the fulfillment of the national primary ambient air quality standards promulgated by Respondent's Administrator for the St. Louis Metropolitan Area;"

and substituting in its place the following sentence:

> "We believe and allege that information made known since June 30, 1972 discloses that compliance with said Section B at Petitioner's three plants is not necessary for the fulfillment of the national primary or secondary ambient air quality standards promulgated by Respondent's Adminis-

trator for the St. Louis Metropolitan Area and that the margin of such fulfillment has been increasing."

With reference to the first requested amendment, Petitioner states that the sentence to be deleted is cryptic, perhaps irrelevant and subject to some evidentiary doubts.

With reference to the second requested amendment, Petitioner suggests that the time element stated therein is relevant and that it is appropriate and correct to include therein the averments concerning the secondary standard and the increasing margin by which both standards are being fulfilled.

Respectfully submitted

KEEFE, SCHLAFLY, GRIESEDIECK
& FERRELL

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In the
United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

COURT ORDER OF DECEMBER 31, 1974 SUSTAINING MOTION TO AMEND PETITION

Petitioner's motion for leave to amend petition is granted.

Note: The opinion of the United States Court of Appeals, Eighth Circuit, is printed on pages A-1 through A-26 of Appendix A to the Petition for Certiorari and the judgment of the Court is printed in Appendix B, page A-27, of such Petition.

Supreme Court, U. S.
FILED
AUG 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1542

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

ROBERT H. BORK,
Solicitor General,

WALLACE H. JOHNSON,
Assistant Attorney General,

GERALD P. NORTON,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	3
Statement	3
Argument	7
Conclusion	11
Appendix	1a

CITATIONS

Cases:

Bob Jones University v. *Simon*, 416 U.S. 725	8
Clark v. *Gabriel*, 393 U.S. 256	8
Oljato Chapter v. *Train*, 515 F.2d 654	10
South Carolina v. *Katzenbach*, 383 U.S. 301	8
Train v. *Natural Resources Defense Council, Inc.*, No. 73-1742, decided April 16, 1975	7, 9, 10

Constitution, statutes, and regulation:

United States Constitution:

Fifth Amendment	3, 8
Article III	3, 8

Clean Air Act of 1970, as added, 84 Stat. 1676, *et seq.*, 42 U.S.C. 1857, *et seq.*:

Section 109, 42 U.S.C. 1857c-4	4

Constitution, statutes, and regulation—Continued	Page
Section 109(b)(1), 42 U.S.C. 1857c-4(b)(1)	3
Section 109(b)(2), 42 U.S.C. 1857c-4(b)(2)	3
Section 110, 42 U.S.C. 1857c-5	3
Section 110(a)(1), 42 U.S.C. 1857c-5(a)(1)	4
Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2)	2, 3, 10, 1a
Section 110(a)(2)(A)-(H), 42 U.S.C. 1857c-5(a)(2)(A)-(H)	3-4, 1a-3a
Section 110(c), 42 U.S.C. 1857c-5(c)	4
Section 116, 42 U.S.C. 1857d-1	9
Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1)	2, 3, 4, 5, 6, 9, 10, 3a-4a
40 C.F.R. Part 50	4
Miscellaneous:	
36 Fed. Reg. 8186	4
37 Fed. Reg. 10875, *et seq.*	4

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. A-1 to A-26) is reported at 515 F. 2d 206.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. A-27) was entered on March 27, 1975. The petition for a writ of certiorari was filed on June 9, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in reviewing a state implementation plan under Section 110(a)(2) of the Clean Air Act, the Administrator of the Environmental Protection Agency is required to determine whether sources of emissions in the state will be unable, due to economic or technological infeasibility, to comply with the state plan's requirements.

2. Whether direct judicial review under Section 307(b)(1) of the Act may be had of the Administrator's approval of a state implementation plan under Section 110(a)(2) on the ground that economic or technological factors make it impossible for a particular source of emissions to comply with the plan's requirements.

3. Whether, if the Act precludes or does not authorize such judicial review, it unconstitutionally limits the judicial power of the court of appeals or deprives one claiming such impossibility of property without due process.

4. Whether the Administrator's approval of a state implementation plan is invalid if the requirements of the plan are not necessary to attain or maintain national ambient air quality standards issued by the Administrator.

5. Whether the Act requires that a challenge to a state implementation plan based on the claim that a pollutant for which the Administrator has issued a national standard is not a health hazard must be presented first to the Administrator, whose determination is subject to judicial review only in the manner prescribed for promulgation or revision of such national standards.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of Article III of the Constitution are set forth at Pet. 3-4. The relevant portions of the Fifth Amendment to the Constitution and Sections 110(a)(2) and 307(b)(1) of the Clean Air Act, as added, 84 Stat. 1680, 1708, 42 U.S.C. 1857c-5(a)(2) and 1857h-5(b)(1), are set forth in the Appendix, *infra*, pp. 1a-4a.

STATEMENT

Pursuant to Section 110 of the Clean Air Act, as added in 1970, 42 U.S.C. 1857c-5, each state is required to adopt and submit to the Administrator of the Environmental Protection Agency ("E.P.A.") a plan providing for the implementation, maintenance, and enforcement, within the air quality control regions in that state, of the national "primary" and "secondary" ambient air quality standards promulgated by the Administrator. National primary standards are those "requisite to protect the public health," while secondary standards are those "requisite to protect the public welfare." Sections 109(b)(1) and 109(b)(2), 42 U.S.C. 1857c-4(b)(1) and 1857c-4(b)(2). The Administrator must approve or disapprove a state plan within four months of its submission. Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2). If he determines that the plan meets the

requirements of Section 110(a)(2)(A)-(H), 42 U.S.C. 1857c-5(a)(2)(A)-(H), he is required to approve the plan. If he finds the state plan deficient, he must disapprove it and, after giving the state an opportunity to revise the plan, propose and promulgate his own regulations correcting the deficiency. Section 110(c), 42 U.S.C. 1857c-5(c).

On April 30, 1971, the Administrator promulgated national standards, pursuant to Section 109 of the Act, 42 U.S.C. 1857c-4, for sulfur dioxide and five other air pollutants that he found constitute a hazard to public health (36 Fed. Reg. 8186). See 40 C.F.R. Part 50. Petitioner, who operates three coal-burning electric power plants in the St. Louis area that emit sulfur dioxide, did not seek judicial review of the standards, although entitled to do so under Section 307(b)(1) of the Act, 42 U.S.C. 1857h-5(b)(1), by filing a petition for review within thirty days in the United States Court of Appeals for the District of Columbia Circuit.

Pursuant to Section 110(a)(1) of the Act, 42 U.S.C. 1857c-5(a)(1), the State of Missouri thereafter submitted its implementation plan to the Administrator, who, on May 31, 1972, approved the provisions of the plan at issue here. 37 Fed. Reg. 10875, *et seq.* Petitioner did not seek judicial review of the Administrator's approval of the plan, as it was entitled to do under Section 307(b)(1) by filing within thirty days a petition for review in the court of appeals for the appropriate circuit.

Two years later, on May 31, 1974, the Administrator notified petitioner that its plants were violating the sulfur dioxide regulations contained in the approved Missouri implementation plan.

On August 18, 1974, petitioner filed in the court of appeals a petition for review of the Administrator's approval in 1972 of the Missouri plan alleging (1) that it faced various economic and technological difficulties in complying with the sulfur dioxide regulations,[1] (2) that sulfur dioxide in the ambient air should no longer be regarded as a health hazard, and (3) that compliance with the state regulations is not necessary for attainment or maintenance of national air quality standards in the St. Louis metropolitan area. By claiming that all of these grounds arose more than 30 days after the Administrator's approval of the plan, petitioner attempted to invoke the provision of the Act permitting a petition for judicial review of E.P.A.'s approval of an implementation plan to be filed more than thirty days after approval when "based solely on grounds arising after such 30th day." Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1).

The court of appeals granted motions filed by the Administrator and certain intervenors[2] to dismiss

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[1] More specifically, petitioner alleged (see Pet. 4-5; Pet. App. A-4, n. 8) that (1) the oil embargo and other economic factors had resulted in such shortages of and high prices for the necessary low-sulfur coal that requiring its use was against the public interest; (2) that adequate sulfur dioxide removal equipment has not been developed; (3) that such equipment is costly; and (4) that petitioner's purchase of such equipment could not realistically be financed.

[2] The State of Missouri and the Missouri Air Conservation Commission intervened as respondents in the court of appeals.

the petition for review for lack of jurisdiction. The court held that Section 307(b)(1) of the Act authorized it to set aside the Administrator's approval of an implementation plan only on grounds—whether arising before or after thirty days from the approval date—that would have required the Administrator to disapprove the plan, and that the economic and technological claims made by petitioner did not constitute such grounds (Pet. App. A-8 to A-24).

The court also held that it had no jurisdiction over petitioner's claim that the regulations were unnecessary to attain national standards because, in view of the Act's recognition of state authority to adopt requirements more stringent than those needed to attain or maintain national standards, the Administrator could not withhold approval on that basis, and hence the court could not invalidate approval on that ground (Pet. App. A-25 to A-26).

Finally, the court held that petitioner's claim that sulfur dioxide is not the health hazard it was once thought to be was not properly before the court because that was effectively a challenge to the Administrator's promulgation of national standards for sulfur dioxide, which should be presented in the first instance to the Administrator and which, in any event, could be the subject of judicial review under the Act only in the United States Court of Appeals for the District of Columbia Circuit (*id.* at A-24 to A-25). See Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1).

In light of its ruling on jurisdiction, the court of appeals found it unnecessary to determine whether

the factual grounds of petitioner's allegations were well-founded or whether they arose entirely after the thirty-day period (*id.* at A-6 to A-8, A-24).

ARGUMENT

1. The principal question presented in the petition concerns the Administrator's obligation to consider economic and technological difficulties of compliance in determining whether to approve a state implementation plan. This is also the question presented by the E.P.A.'s pending petition in *Environmental Protection Agency* v. *St. Joe Minerals Corp.*, No. 74-1650, petition for a writ of certiorari filed on June 28, 1975. As our petition in that case indicates,[3] in our view this is a question warranting review by this Court in light of the conflicting decisions of the courts of appeals, the conflict between the court of appeals' decision in *St. Joe* with this Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, No. 73-1742, decided April 16, 1975 (*NRDC*), and the adverse effects of the *St. Joe* ruling on the E.P.A.'s ability to perform properly its statutory responsibilities. There is now a possibility, however, that the decision in *St. Joe* may become moot because of subsequent changes in the Pennsylvania regulations there in issue.[4] Accordingly, we believe it would

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[3] We are serving a copy of our petition in that case on petitioner.

[4] Should *St. Joe* become moot we will of course suggest that the Court grant certiorari so as to summarily vacate the judgment and remand for dismissal as moot.

be appropriate to grant certiorari in this case with respect to the first question presented in the petition.[5]

2. With respect to the remaining questions presented by petitioner, the petition should be denied.

a. Petitioner contends that the Clean Air Act, as construed by the court of appeals to preclude judicial review at this time of petitioner's claims of economic and technological infeasibility, is unconstitutional because it limits the judicial power of the court of appeals in violation of Article III and deprives petitioner of property without due process in violation of the Fifth Amendment.

Petitioner cites no conflict of decisions regarding the first claim, which is in any event without substance. It is well-settled that, in exercising its power under Article III to ordain and establish "inferior Courts" and to vest in them "[t]he judicial Power of the United States," Congress has great latitude in limiting the jurisdiction of those courts and specifying the questions they may adjudicate. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331-332; *Clark* v. *Gabriel*, 393 U.S. 256, 259; *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748.

While petitioner's due process claim likewise involves no conflict[6] and is insubstantial, it is in any

[5] In our statement of the questions presented (p. 2, *supra*) we have divided petitioner's first question into its two component questions.

[6] The conflict of decisions cited by petitioner (Pet. 8-9) concerns the question whether the Act requires the Administrator to consider claims of economic or technological infeasibility,

event premature. Petitioner asserts that the court of appeals decision "states that these factors may never be judicially considered" (Pet. 6). Although the court did observe that the petitioner's economic and technological assertions were not cognizable on a petition for review of E.P.A.'s approval of an implementation plan and involved "essentially legislative judgments" and "political question[s]" (Pet. App. A-22 to A-23), the court did not hold that such issues, when alleged to deprive a person of property, could never be subject to judicial scrutiny, in a federal (or state) enforcement proceeding or otherwise. That question was not before the court of appeals in this case; any observations the court can be said to have made in that regard would have been *dicta*, which provide no occasion for review at this time.[7]

b. Petitioner's contention that approval of a state implementation plan should be set aside insofar as its requirements are unnecessary to attain or maintain national standards has not been accepted by any court and is at odds with the terms of the Act and this Court's construction of it in *NRDC*, *supra*.

Section 116 of the Act, 42 U.S.C. 1857d-1, specifically recognizes the retained authority of states to

not whether due process requires that the court of appeals entertain such claims in exercising the limited judicial review authorized by Section 307(b)(1) of the Act.

[7] As we noted in our petition in *St. Joe* (Pet. 8, nn. 7, 8), other courts of appeals have said in *dicta* that economic or technological feasibility could be an issue in enforcement proceedings, but that issue is not directly before the Court in *St. Joe* or in this case.

adopt or enforce emissions standards or limitations or other air pollution control requirements, provided only that they not be less stringent than those contained in an applicable implementation plan. And, in *NRDC* this Court noted "the Act's encouragement of the States to adopt plans even stricter than those required to attain national standards." Slip op. 12.

c. Petitioner's final claim is that E.P.A.'s approval of an implementation plan may be challenged on the ground that a pollutant for which E.P.A. has issued a national standard to be attained by the plan should no longer be regarded as a health hazard.

The necessity for a particular national standard is not among the limited grounds on which E.P.A. is authorized under Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2), to disapprove a state plan. See *NRDC*, *supra*. The Act specifies, moreover, a distinct procedure for judicial review of E.P.A.'s actions concerning promulgation of national standards (as distinguished from approval of state implementation plans), under which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia Circuit. Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1). The conclusion of the court below that judicial review of petitioner's claim concerning whether sulfur dioxide is a health hazard could be had only in the District of Columbia Circuit was recently endorsed by that court in *Oljato Chapter* v. *Train*, 515 F.2d 654, where the court specified the procedures to be followed by one challenging

E.P.A.'s adoption of a standard on grounds allegedly arising more than thirty days after its promulgation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted with respect to the first question presented in the petition and denied in all other respects.

Respectfully submitted.

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AUGUST 1975.

APPENDIX

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 110(a)(2) of the Clean Air Act, as added, 42 U.S.C. 1857c-5(a)(2), 84 Stat. 1680, provides:

> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance

with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be

correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h-1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

Section 307(b)(1) of the Clean Air Act, as added, 84 Stat. 1708, 42 U.S.C. 1857h-5(b)(1), provides:

> (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under

section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

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On Petition for a Writ of Certiorari to the
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for the Eighth Circuit

PETITIONER'S REPLY
to
MEMORANDUM FOR THE RESPONDENT

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PETITIONER'S REPLY
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MEMORANDUM FOR THE RESPONDENT

In this reply we direct our attention solely to respondent's claim that the petition for certiorari should be denied with respect to questions 2, 3 and 4 (Pet. 2-3). Each of questions 2 and 3 refer to constitutional matters, and they have been combined by respondent into a single question (No. 3) in its Memorandum, p. 2. In the context of this particular case, we see nothing wrong with that combination.

Supreme Court Rule 23.1(c) says that "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." While we have stated the constitutional questions separately in our petition, we believe that it could be strongly contended that, at least to some extent, they may be "fairly comprised" within the first question, which involves the interpretation of an Act of Congress. Certainly a citation of cases is not necessary to support the proposition that a statute will be construed in a constitutional, rather than an unconstitutional, manner when reasonably possible. Thus the process of interpreting a statute may involve constitutional considerations, and in this case we think it does.

Most lawyers in the United States believe that a person is constitutionally entitled at some time to judicial review of administrative action which seriously affects his person or property.

For the purpose of an assumption only, let us suppose that this Court holds (1) that Section 307(b)(1) of the Clean Air Act, as added, may constitutionally be interpreted to prevent petitioner from raising technological, economic and impossibility factors in a proceeding thereunder, since (2) the due process requirement of the 5th Amendment is satisfied inasmuch as these matters may be raised in an enforcement proceeding. Frankly we would think that the proposition stated in (2) above is a part of the ~~decision~~ decision and not *dicta*.

As a matter of fact the preceding paragraph sets forth the thrust of the 7th Circuit's decision in *Indiana & Michigan Electric Company v. Environmental Protection Agency*, 509 F(2) 839. That was a Section 307(b)(1) proceeding wherein the Court held that such matters could not be raised in a 307(b)(1) case, but that they could be raised in an enforcement proceeding, and thereby the constitutional requirement of due process would be met (p. 847 of opinion). We respectfully submit that the 7th Circuit did not think this was *dicta*, that Federal District Judges in that Circuit will not think it is *dicta* and that the 7th

Circuit will not, when an enforcement proceeding in fact comes before it, think that its earlier statement is *dicta*. Thus the Solicitor General is about the only person who thinks it is (n. 8, p. 8 of his petition for certiorari in the *St. Joe* case—No. 74-1650).

Getty Oil Co. v. Rucklehaus (3rd CCA), 467 F(2) 349 was neither a Section 307(b)(1), nor an enforcement, proceeding. The Court said (p. 356) "The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." After full consideration the 3rd Circuit said that questions of economic hardship or lack of compelling necessity may be raised in a section 307(b)(1) proceeding only (p. 357). Three years later in the *St. Joe* case, 508 F(2) 743 the 3rd Circuit did not think that its earlier statement in the *Getty* case was *dicta* (see p. 747 of the *St. Joe* opinion). And neither did the 7th Circuit think the *Getty* statement was *dicta* in its *Indiana & Michigan Electric Co.* decision, since it specifically declined to follow the *Getty* decision (509 F(2) at p. 845).

The 6th Circuit's decision in *Buckeye Power Co. v. EPA*, 481 F(2) 162, is something of an anomaly. The Court there held (1) that the Administrative Procedure Act requires participation by interested parties prior to the Federal promulgation of an implementation plan *and* (2) that claims of technological infeasibility, high-cost benefit and resource unavailability may be raised in an enforcement proceeding (pp. 168-9 and 173 of the opinion). A reading of those pages of the opinion clearly indicates that the 6th Circuit did not think that its statement about an enforcement proceeding was *dicta*. We submit that Federal District Judges in the 6th Circuit will not consider it as *dicta* and that the 6th Circuit will not consider it as *dicta* when the matter later comes before it in an enforcement proceeding.*

---

* In the *St. Joe* petition for certiorari (No. 74-1650, n. 7 on p. 8) the Solicitor General says that the 6th Circuit's statement is *dicta*. We again respectfully suggest that he is alone in that opinion.

Turning now to the instant case, on page 8 of its memorandum, respondent says that the Eighth Circuit's decision merely precludes judicial review of economic and technological infeasibility claims *at this time*. But that is not what the Eighth Circuit said. That Court in fact said that such claims may never be subjected to judicial review (Pet. A 22-23).

Further on page 8 of its memorandum respondent says that "Congress has great latitude in limiting the jurisdiction of (Federal) courts and specifying the questions they may adjudicate." We agree with this statement, but that is not the situation here. The Eighth Circuit said that Courts can *never* consider economic and technological infeasibility claims. Consequently Congress, according to the Eighth Circuit, has completely withdrawn these questions from the judiciary and placed *final* and *absolute* power to resolve them in a Federal Administrative Agency.

On page 9 of its memorandum, respondent implies that economic and technological issues might be heard in an enforcement proceeding, and it says that the Eighth Circuit did not hold otherwise. But the Eighth Circuit did not say that. To the contrary that Court said that such issues may not be heard in any judicial proceeding—and that includes an enforcement proceeding.

We respectfully submit that in an enforcement proceeding at some future date within the states comprising the Eighth Circuit, the Federal District Judges will not consider the Court of Appeals' statement as *dicta*. And we further submit that when the decision of such a District Judge is appealed to the Eighth Circuit Court of Appeals, that Court will not consider its earlier statement in the *Union Electric* case as *dicta*. Then we will be back where we started—trying to get the matter before this Court.

We agree and sympathize with respondent's desire for a ruling by this Court which will enable the EPA "to perform properly its statutory responsibilities" (P. 7 of its memorandum). But we also think that the persons subject to such "responsibilities" are entitled to know their rights. We respectfully submit that the constitutional questions are a significant and integral part of this case and that they should be, and in fact hardly can help being, considered in its resolution.

The fourth question, which was posed by respondent on page 2 of its memorandum and discussed on pages 9 and 10, (namely whether approval of an implementation plan is invalid if the plan's requirements are not necessary to attain or maintain national ambient air standards) was not mentioned as a question in our petition for certiorari. Consequently we do not think it is now, or ever was, presented to this Court.

Our fourth (and respondent's fifth) question relates to the provision in the Missouri implementation plan concerning sulfur dioxide emissions. The Eighth Circuit's decision on that question was based on statements in Report No. 91-1196 issued September 17, 1970 by the Senate Committee on Public Works accompanying S. 4358. Since that report is about the only Congressional statement concerning the judicial review provisions of Section 307(b)(1) of the Clean Air Act, as amended, we do not know how counsel or this Court can skirt around it in deciding the instant case. In the *Oliato* case, 515 F(2) 654, which respondent says endorses the *Union Electric* decision on this question, the District of Columbia Court of Appeals says (pp. 665-6):

> "While we are not as sure as the Eighth Circuit that this reading of Section 307 flows inexorably from the *Senate Report*, we think this holding makes good sense and is consistent with the statutory scheme."

And finally the Court relies on its "inherent powers" in deciding this matter of statutory construction (P. 666 of opinion).

For the reasons stated above and in our petition for certiorari, we pray that it be granted as to all questions presented therein, not only as to the first question as respondent requests.

Respectfully submitted

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PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

The sole purpose of this supplemental brief is to direct the Court's attention to the decision on August 21, 1975, of the United States Court of Appeals for the Third Circuit in *Duquesne Light Company et al. v. Environmental Protection Agency* (No. 72-1542).

In its Memorandum responding to the Petition for Certiorari in the instant case, the Solicitor General, as counsel for

the Environmental Protection Agency, pointed out on page 7 thereof that such Agency had filed a Petition for Certiorari, with respect to the Third Circuit's decision in *Environmental Protection Agency v. St. Joe Minerals Corp.*, No. 74-1650; and counsel correctly pointed out that the decision of the Third Circuit in *St. Joe* is directly in conflict with the decision of the Eighth Circuit in the instant Union Electric case.

However, the Solicitor General further pointed out that the *St. Joe* case might become moot (p. 7). As an examination of the *Duquesne Light Company* case demonstrates, the Third Circuit's views in the *St. Joe* decision are refortified and re-affirmed in *Duquesne Light*. We thus point out that a serious and substantial conflict still exists among the Circuits.

Respectfully submitted

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INDEX

Page

Opinion below 1

Jurisdiction 1

Statute involved 2

Question presented 3

Statement of the case 3

Summary of argument 8

Argument 12

I. Congress has the constitutional power to enact legislation placing in the Court of Appeals for the Eighth Circuit the jurisdiction and duty to engage in a fact-finding process as a basis for the decision of this case 12

II. Section 307(b)(1) of the Clean Air Act Amendments places in the Court of Appeals for the Eighth Circuit the jurisdiction and duty of factually determining whether technological and economic factors arising more than 30 days after EPA approval of the Missouri implementation plan have made it impossible for Union Electric Company to comply with the sulfur emission regulation in that plan and manifestly against the public interest for it to attempt to do so 13

A. The relevant decisions of the United States Courts of Appeal support this proposition 15

B. Governing provisions of the Clean Air Act Amendments and their Congressional history call for such an interpretation 22

C. Only an interpretation of this sort fulfills the constitutional requirement of due process of law 29

Conclusion 33

Cases Cited

Appalachian Power Company v. EPA, 477 F. 2d 495 (4th Cir. 1973) 18

Brown v. EPA, — F.2d —, Vol. 4 of CCH Pollution Control Guide 16,144, cited as 1 PCG par. 15,142 (9th Cir. decided August 15, 1975) 29

Buckeye Power Inc. v. EPA, 481 F. 2d 162 (6th Cir. 1973) 19, 28

Davidson v. Gardner, 172 F. 2d 188 (7th Cir. 1949) 12

Duquesne Light Co. v. EPA, 481 F. 2d 1 (3rd Cir. 1973) 16, 21

Duquesne Light Co. v. EPA, — F.2d —, Vol. 4 of CCH Pollution Control Guide 16,133, cited as 1 PCG par. 15,141 (3rd Cir. decided August 21, 1975) 16, 17

Getty Oil Company v. Ruckelshaus, 467 F. 2d 349 (3rd Cir. 1972) 15, 16, 22, 29, 31

Howard v. Illinois Central Railroad Company, 207 U.S. 463 (1908) 29

Indiana & Michigan Elec. Co. v. EPA, 509 F. 2d 839 (7th Cir. 1975) 15, 20, 21, 31

N.L.R.B. v. Remington Rand, Inc., 130 F. 2d 919 (2nd Cir. 1942) 12

N.L.R.B. v. Teamsters Local 282, 438 F. 2d 100 (2nd Cir. 1970) 12

Oljato Chapter v. Train, 515 F. 2d 654 (D.C. Cir. 1975) .. 24

Phelps v. U.S., 274 U.S. 341 (1927) 29

St. Joe Minerals Corp. v. EPA, 508 F. 2d 743 (3rd Cir. 1975) 17

Texas v. EPA, 499 F. 2d 289 (5th Cir. 1974) 30

Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 27, 28

Union Electric Company v. EPA, 515 F. 2d 206 (8th Cir. 1975) 1

Constitutional and Statutory Citations

U.S. Constitution

Art. III, Sec. 1 12

5th Amendment 29

Clean Air Act

Section 101—42 U.S.C. Section 1857 and footnotes .. 3

110—42 U.S.C. Section 1857c-5 ..... 4, 20, 21

110(a)(2)—42 U.S.C. Section 1857c-5(a)(2) .. 8

110(e)—42 U.S.C. Section 1857c-5(e) 28

110(f)—42 U.S.C. Section 1857c-5(f) 28

111(a)(1)—42 U.S.C. Section 1857c-6(a)(1) .. 14

113—42 U.S.C. Section 1857c-8 22

113(a)(4)—42 U.S.C. Section 1857c-8(a)(4) .. 31

113(c)—42 U.S.C. Section 1857c-8(c) 4

113(c)(1)—42 U.S.C. Section 1857c-8(c)(1) .. 7, 8

116—42 U.S.C. Section 1857d-1 8

304—42 U.S.C. Section 1857h-2 22

307(b)(1)—42 U.S.C. Section 1857h-5(b)(1)..2, 5, 6, 9, 10, 12, 13, 15, 17, 19, 20, 21, 22, 23, 29

307(b)(2)—42 U.S.C. Section 1857h-5(b)(2) 16, 21, 25

307(c)—42 U.S.C. Section 1857h-5(c) 19

Other

Administrative Procedure Act, Pub. L. 89-554 (1966)— 5 U.S.C. Section 553(c) 19, 20

62 Stat. 928—28 U.S.C. Section 1254(1) 2

Congressional Report

Report No. 91-1196 of the Committee on Public Works of the United States Senate, 91st Cong. 2nd Session, accompanying S. 4358 (September 17, 1970) 7, 10, 19, 21, 23, 25, 27

Court Rules

Fed. R. Civ. P. 53(a) 12

Sup. Ct. Rule 40(d)(1) 8

Treatise

Moore's Federal Practice (2d Ed. 1974) Vol. 5A, p. 3029 12

Miscellaneous

37 Fed. Reg. No. 105, Part 3 4

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 515 F.2d 206. It is printed at pages A-1 through A-26 of Appendix A to the petition for certiorari in this case.

JURISDICTION

The judgment of the Court of Appeals (printed on page A-27 of Appendix B to the petition for certiorari) was entered on

March 27, 1975. The petition for writ of certiorari was filed on June 9, 1975, and granted as to Question 1 therein on October 6, 1975. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

This case involves the construction and interpretation of Section 307 (b)(1) of the Clean Air Act Amendments (42 U.S.C. Section 1857h-5 (b)(1)) which says:

> "A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."[1]

[1] Of course references to the appropriate sections in Title 42 of the United States Code are different from the quoted section references, which are made to the Clean Air Act Amendmnts.

QUESTION PRESENTED

The question, with respect to which certiorari was granted by this Court, reads as follows:

> "1. Does the Section of the Clean Air Act (Section 307 (b)(1)), which provides for judicial review by the Court of Appeals of EPA approval of sulfur dioxide emission regulations in the Missouri implementation plan, prevent the Court of Appeals from considering technological and economic factors applicable to petitioner and such regulations, when the petition for judicial review was filed more than 30 days after EPA approval of such plan, when such technological and economic factors arose more than 30 days after EPA approval and when those factors make it impossible for petitioner to comply with those regulations and manifestly against the public interest for it to attempt to do so."

STATEMENT OF THE CASE

The petitioner Union Electric Company is primarily an electric utility which serves, through its own facilities and those of subsidiaries, electric service in the St. Louis Metropolitan Area, a large part of Missouri and parts of Illinois and Iowa (A.3). It owns and operates three coal-fired generating plants in Missouri (the Labadie, Sioux and Meramec Plants) which produce the major portion of its electric requirements (A.3).

The respondent Environmental Protection Agency (EPA) is an agency of the United States, which is charged with the enforcement of the Clean Air Act as amended. (See Section 101 of the Clean Air Act—42 U.S.C. Section 1857 and particularly the footnotes thereunder.) On May 31, 1972, the Administrator of the EPA approved an implementation plan for the

State of Missouri pursuant to Section 110 of the Federal Clean Air Act as amended—also 42 U.S.C. Section 1857c-5 (See 37 Fed. Reg. No. 105, Part 3).

This implementation plan includes Section B, Regulation X of the Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area (A. 2). And said Section B of Regulation X limits the emission of sulfur dioxide from coal burning facilities such as the three Union Electric plants mentioned above (A. 5). On May 31, 1974, the Respondent EPA formally notified Union Electric that sulfur dioxide emissions from those plants violated the requirements of Section B of the Federally approved Missouri Implementation Plan (A. 5).

On August 19, 1974, Union Electric filed a petition in the United States Court of Appeals for the Eighth Circuit requesting review of this emission regulation (A. 2). The petition set forth the facts discussed above, outlined the status of variance proceedings before Missouri Agencies (A. 4-5) and pointed out that compliance with Regulation B would require it to shut down these three plants and discontinue electric service to a large number of people in the mid-west (A. 5-6). The alternative of paying a federal fine of up to $50,000 per day[2] could, the petition alleged, impose monetary burdens and create an event of default under the Company's mortgage, which would make further financing impossible and place the Company in bankruptcy (A. 6).

The Company prayed for relief from the requirements of Regulation B, because grounds arising more than 30 days after Federal approval of the Missouri implementation plan (which includes that regulation) have made it impossible for the Company to comply therewith or, in the alternative, manifestly against the public interest (A. 6).[3]

[2] Section 113(c) of the Clean Air Act as amended (42 U.S.C. Sec. 1857c-8(c)).

The grounds arising more than 30 days after EPA approval of the plan were detailed in the petition as follows (A. 7-8, 13-15):

> 1. The Arabian Oil Embargo and related economic factors, occurring after June 30, 1972 (a date which was 30 days following approval of the plan), have resulted in such a shortage of, and high price for, low sulfur coal that it is impossible for petitioner to obtain a sufficient quantity to comply with the plan's sulfur regulation or, alternatively, the cost of such coal, if it could be obtained, would make its purchase manifestly against the public interest.
>
> 2. Since June 30, 1972, it has been demonstrated that sulfur dioxide removal equipment (scrubbers), which would enable the sulfur regulation to be met, have not been developed or invented.
>
> 3. Since June 30, 1972, the price of scrubbers so far developed has increased so much that installation costs at these three plants would be more than $500,000,000.
>
> 4. Because of economic factors, occurring since June 30, 1972, it would be impossible to obtain financing required to install such scrubbers. Alternatively, if financing could be obtained and installation effected, the carry-

[3] Section 307 (b) (1) of the Clean Air Act as amended (42 U.S.C., Section 1857h-5(b)(1)) says "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit . . . within 30 days from the date of such promulgation, approval, or action, *or after such date if such petition is based solely on grounds arising after such 30th day.*" (emphasis added)

ing, operating and maintenance costs of over $120,000,000 annually would be manifestly against the public interest.[4]

5. Research and reports made known since June 30, 1972, disclose that sulfur dioxide in the ambient air is not the medical hazard it was previously thought to be.

6. Since June 30, 1972, it has been demonstrated that compliance with the sulfur regulation is not necessary for fulfillment of the national primary and secondary ambient air standards in the St. Louis Metropolitan area.[5]

The Court of Appeals ordered the case briefed and argued solely on the question of its subject matter jurisdiction (A. 9). A motion to dismiss for lack of jurisdiction was filed by Respondent EPA (A. 12); and a motion to dismiss for failure to state a claim and primary jurisdiction in the Missouri Air Conservation Commission was filed by that Commission and the State of Missouri, each of which had been permitted to intervene as respondents (A. 1, 10-11). Following the submission of briefs and oral argument, those motions were sustained in the opinion and judgment, which are printed on pages A-1 through 26 and A-27, respectively, of the appendices to the petition for certiorari.

The Court of Appeals held that impossibility, or other, claims based upon technological and economic factors cannot be judicially considered in a Section 307 (b)(1) proceeding, regardless of whether it is brought within 30 days of EPA approval of the plan or whether it is brought after such 30 days and admittedly based on grounds arising thereafter. The Court did

[4] With reference to these four grounds, we point out that the petition alleges that low sulfur coal or scrubbers constitute the only scientific basis for a claim that any emission regulation might be met (A. 6-7).

[5] The averment in this form became a part of the petition by amendment (A. 13-15).

not specifically refer to the question of whether such claims and factors could be considered in enforcement proceedings,[6] but strongly indicated that they may *never* be judicially considered. Thus on pages A-22 and 23 of the appendix to the petition for certiorari, the Eighth Circuit says:

> "While the (technological and economic) considerations Petitioner asserts in its petition for review are important ones needing resolution, they are not appropriate for judicial resolution but are essentially legislative judgments as to where the public interest lies . . .
>
> "This is in essence a political question. The answer should be and, when the situation is grave enough, perhaps will be made in the legislative arena." (matter in parentheses added)

With respect to Union Electric's claim that information made known since June 30, 1972, demonstrates that sulfur dioxide is not the health hazard it was once thought to be, the Court held that this constituted a challenge to a national standard, which would have to be presented first to the EPA and then reviewed in the District of Columbia Circuit, if at all (pages A-24 and A-25 of the appendix to the petition for certiorari). This holding was based principally on the statements made at pages 41 and 42 of Report No. 91-1196 of the Committee on Public Works of the United States Senate, 91st Cong. 2nd Session, accompanying S. 4358 (September 17, 1970).[7] Since the

[6] Section 113(c)(1) of the Clean Air Act Amendments (42 U.S.C. Section 1857c-8(c)(1) says that violations by a corporation or individual of federally approved state implementation plans are punishable by Federal District Courts with fines of up to $25,000 to $50,000 per day of violation and/or imprisonment of up to one or two years, dependent upon whether there has been a conviction for a previous offense.

[7] Although in many important respects this report does not give a completely clear picture of Congressional intent concerning the meaning of the Clean Air Act Amendments, it is the best (and virtually only) Congressional guide we have.

question (No. 4) in the petition for certiorari, which deals with this point, was not included in the grant of certiorari, it will not be discussed in this brief, except as it might be thought subsidiary to the question on which certiorari was granted. See Sup. Ct. Rule 40(d)(1).

Referring to petitioner's claim that information made known since June 30, 1972, demonstrates that compliance with the sulfur regulation is not necessary to meet the national air standards in the St. Louis area, the Eighth Circuit noted that state standards may be stricter than Federal, though, of course, those stricter state standards become federally enforceable standards when included in an implementation plan that is approved by the EPA.[8] We point out, however, that this ruling was not presented as a question in our petition for certiorari and thus may be considered only insofar as it is subsidiary to the question on which certiorari was granted.

SUMMARY OF ARGUMENT

Since this petition is based solely on grounds arising more than 30 days after EPA approval of the Missouri implementation plan, it is apparent that neither the EPA, which approved the plan, nor the state agency, which formulated the plan, could have considered those grounds. Consequently there is no record for the Court of Appeals to review, and that Court itself must engage in a fact-finding procedure. No one questions that Congress can constitutionally require the Court of Appeals to undertake such a task—indeed the United States Court of Appeals for the Eighth Circuit admitted that to be true in the instant case (see p. A-7 of Appendix A to the petition for certiorari).

[8] See pages A-25 and 26 of the appendix to the petition for certiorari and Sections 110(a)(2), 113(c)(1) and 116 of the Clean Air Act as amended (42 U.S.C. Sections 1857c-5(a)(2), 1857c-8(c)(1) and 1857d-1, respectively).

And, as the Eighth Circuit there indicated, the procedure to be followed would entail the appointment of a master, whose findings and record would be reviewed by the Court.

So far as we can determine, the decision of the Eighth Circuit is the first and only reported decision involving a petition under Section 307(b)(1), which is based on grounds arising more than 30 days after EPA approval of an implementation plan. As the Eighth Circuit indicated (page A-2 of Appendix A to the petition for certiorari), there have been a number of decisions involving petitions under that section, which were filed within 30 days of approval of a plan.

We believe there might be a stronger argument for judicial consideration of technological and economic factors arising after EPA approval than there would be for such a consideration at the time of approval. Presumably, at the time the 1970 amendments to the Clean Air Act were enacted, Congress was aware of the relevant facts and aspirations and could make a limited appraisal of the future. However, it obviously could not, and knew it could not, know what the facts might be, and whether such aspirations might have been achieved, several years hence.

However, the Eighth Circuit held that, at least so far as technological and economic factors are concerned, cases brought on grounds arising more than 30 days after EPA approval should be treated in the same manner as those brought within such 30 days.[8a] Examining the cases brought within the 30 day period where an industry (usually an electric utility) was a party, we find that three were decided by the Third Circuit, one by the Fourth, one by the Sixth and one by the Seventh.[9] In every one of these cases the Circuit Judges (or Supreme Court Justice

[8a] Page A-17 of Appendix A to the petition for certiorari.

[9] Citation and discussion of these cases will be found in the Argument part of this brief.

or District Judge sitting by appointment) unanimously held that technological and economic factors may be subject to judicial consideration. Thus the Eighth Circuit is the only one of the five circuits considering the point, which has held that this question is political in nature and thus not susceptible of judicial review. Both the weight and nature of authority against the Eighth Circuit holding demonstrate that it is not tenable.

Unfortunately neither the Clean Air Act Amendments nor their Congressional history precisely sets forth the intent of Congress as to the meaning of the section of those amendments which is involved in this case. However common sense indicates that the phrase "grounds arising after such 30th day"[10] would include technological and economic developments which have made it impossible to comply with the sulfur regulation and manifestly against the public interest to attempt to do so. The word "review" in this section, which the Eighth Circuit interprets as requiring an administrative record, cannot have such a meaning in the context in which it is used. Obviously when the grounds arise after the Administrator approves the plan, he could not have considered them, and made a record about them, at the time of his approval.

Referring to Congressional History, on page 42 of the Senate Report[11] the Committee on Public Works said that

> "The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, or approved or promulgated implementation plan after the date of promulgation *whenever it is alleged that significant new information has become available.*" (Emphasis added.)

We believe that our allegations about the impossibility of compliance because of technological and economic developments

[10] Section 307(b)(1)—42 U.S.C. Sec. 1857h-5(b)(1).

[11] Report No. 91-1196, 91st Cong., 2nd Sess. (1970).

following the promulgation of the plan constitute "significant new information" within any reasonable definition of that phrase.

It is well established that an Act of Congress will be construed to be constitutional, rather than unconstitutional, when reasonably possible. Thus the process of interpreting such an Act, or any part thereof, often involves constitutional questions. The constitutional guarantee of due process requires a judicial hearing of the technological and economic possibility (and desirability) of the federally approved Missouri regulation concerning sulfur emissions.[12] As we point out in the following Argument section of our brief, there are several ways the due process requirement could be met. But we submit that an interpretation of Section 307(b)(1) to require a hearing by the Court of Appeals, after a master has taken evidence and made findings, is, in addition to meeting constitutional due process requirements, the interpretation that most clearly conforms with the Congressional intent.

[12] If we were dealing with poisonous air this might not be the case. But, as our petition alleges (A. 13-15), we are dealing with air that meets the National Air Quality Standards.

ARGUMENT

I. Congress Has the Constitutional Power to Enact Legislation Placing in the Court of Appeals for the Eighth Circuit the Jurisdiction and Duty to Engage in a Fact-Finding Process as a Basis for the Decision of This Case.

Certainly a *prima facie* interpretation of Section 307(b)(1) as it applies to petitions based on grounds arising more than 30 days after EPA approval of an implementation plan calls for fact-finding by the Court of Appeals, since the EPA could not, at the time of approval, have taken into account grounds arising thereafter. In the next point of our Argument we demonstrate more fully that this is the proper interpretation of that Section. However, we do not think we are placing the cart too far before the horse by pointing out briefly that Congress has the constitutional power to place such a jurisdiction and duty in the Court of Appeals.

Congress created the Court of Appeals pursuant to the provisions of Section 1, Article III of the United States Constitution, and it alone has the power under that provision to delineate the Court's jurisdiction, original or appellate. See *Davidson v. Gardner*, 172 F.2d 188, at p. 191 (7th Cir. 1949) and the Eighth Circuit decision in the instant case (page A-7 of Appendix A to the petition for certiorari).

As the Eighth Circuit pointed out on the page of its opinion referred to above, there are instances where the Courts of Appeal engage in fact-finding processes, and in those instances they utilize the provisions of Fed. R. Civ. P. 53(a), concerning the appointment of masters. See *N.L.R.B. v. Teamsters Local 282*, 438 F.2d 100 (2d Cir. 1970); *N.L.R.B. v. Remington Rand, Inc.*, 130 F.2d 919, 925-6 (2d Cir. 1942), and Moore's Federal Practice (2d Ed. 1974), Vol. 5A, p. 3029.

II. Section 307 (b)(1) of the Clean Air Act Amendments Places in the Court of Appeals for the Eighth Circuit the Jurisdiction and Duty of Factually Determining Whether Technological and Economic Factors Arising More Than 30 Days After EPA Approval of the Missouri Implementation Plan Have Made It Impossible for Union Electric Company to Comply With the Sulfur Emission Regulation in That Plan and Manifestly Against the Public Interest for It to Attempt to Do So.

So far as we can determine the Eighth Circuit's decision is the first and only one involving a petition based on grounds arising more than 30 days following EPA approval of an implementation plan. As we point out later in our Argument, there have been several decisions by the United States Courts of Appeal involving petitions which were filed within 30 days after EPA approval.

Offhand one might think that there are ample and similar reasons why technological and economic factors should be judicially considered, regardless of whether they arose before, or after, EPA approval of an implementation plan. However, we believe that there is a stronger argument for judicial consideration of those factors when they arise after EPA approval than there is when they arose before such approval.

We think it might be assumed that Congress had some knowledge of the relevant facts and aspirations, and could make a limited appraisal of the near future, when the 1970 amendments to the Clean Air Act were enacted. Thus the Congressional view of the energy situation[13] *at that time* is demonstrated by the statement on page 2 of the Senate Report[14] that in order to comply with the Act's requirements "Greater use of natural gas for electric power generation may be required." And no

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[13] Certainly no one would question the fact that air pollution and energy supplies and usage are closely related.

[14] Cited in footnote 11.

doubt the Act's requirements were geared to the then existing Congressional view of the availability of energy sources.

But Congress obviously could not, and knew it could not, know what the future might hold. Thus it provided for a review by the Court of Appeals of implementation plans because of new developments.[15] Certainly the evaporation of Congress' idea that the use of natural gas for electric power generation could be increased, the reduction in oil supplies due to new policies of foreign nations, the unprecedented inflation and its effect on money markets, the shortage (and inefficiencies) of low sulfur coal and the collapse of optimistic appraisals of sulfur removal techniques[16] constitute new developments which call for a review of implementation plans devised and approved under different conditions.

However the Eighth Circuit held that, at least so far as technological and economic factors are concerned, cases brought on grounds arising more than 30 days after EPA approval should be treated in the same manner as those brought within such 30 days.[17] Also we might mention that counsel for Respondent apparently desires that petitions for review be treated similarly, regardless of the timing factor, or, at least, that this Court include in its decision the treatment of petitions filed within 30 days of EPA approval.[18]

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[15] We believe it also relevant to note that with respect to standards for new sources (which look to the future more than those for existing sources) the Clean Air Act Amendments specifically provide that the EPA shall consider technological and economic factors (Section 111(a)(1)—42 U.S.C. Sec. 1857c-6(a)(1)). The EPA determination on those factors would then be reviewable under Section 307 (b)(1).

[16] As Respondent knows Union Electric was one of the first companies to attempt the development and utilization of sulfur dioxide removal equipment.

[17] Page A-17 of Appendix A to the petition for certiorari.

[18] See the statement on page 7 of Respondent's memorandum in response to the petition for certiorari that the question in the instant case is the same as that in the *St. Joe* case which clearly involved a petition filed within the 30 day period.

In any event the only reported decisions, other than the one under review, involved petitions which were filed within the 30 days. Consequently we direct our attention to them.

A. **The relevant decisions of the United States Courts of Appeal support the proposition set forth in Point II above.**

Getty Oil Company v. Ruckelshaus, 467 F.2d 349 (1972), was the first of the Third Circuit decisions. In that case the EPA approved the Delaware implementation plan on August 4, 1971. Neither Getty nor any one else had filed a Section 307(b)(1) proceeding concerning the Delaware plan within the 30 day period or for that matter by the much later date of the Court's decision.

However, prior to the filing of the instant suit, Getty had obtained an injunction in the Delaware Chancery Court restraining the Secretary of the Delaware Natural Resources and Environmental Control from enforcing the sulfur regulation in the state (now federal) implementation plan, and this injunction remained in effect throughout the instant suit. Following the grant of the state injunction, the Federal EPA notified Getty that it was violating the federal plan; and Getty filed the instant suit in the Federal District Court to restrain the Federal EPA from enforcing the federal plan.

The Third Circuit remanded the case to the District Court with instructions to enter an order dismissing the case for lack of jurisdiction. It held that Getty's claims based on technological and economic factors could be presented only in a Section 307(b)(1) petition to the Court of Appeals but that that had not been done. Consequently the Third Circuit held that the District Court did not have jurisdiction to hear those claims in the injunction proceeding Getty chose to bring.[19]

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[19] The Seventh Circuit in *Indiana & Michigan Elec. Co. v. EPA*, 509 F(2) 839, at p. 845 (1975) said that the *Getty* decision also

The decision in this case gave rise to what Courts of Appeal later referred to as the *Getty dilemma*.

The first *Duquesne* case (*Duquesne Light Co. v. EPA*, 481 F. 2d 1 (1973)) was the next Third Circuit decision. In that case Duquesne and St. Joe Minerals Corp. filed Section 307(b)(1) petitions in the Third Circuit within 30 days after the EPA approved the Pennsylvania implementation plan. Those petitions challenged the sulfur emission regulations in that plan on technological and economic grounds.

The Third Circuit had sustained motions to remand the proceedings to the EPA. However the EPA did not know what it was supposed to do on remand so it filed a Motion for Clarification. This Motion constitutes the subject matter of the first *Duquesne* decision.

The Third Circuit questioned whether Duquesne and St. Joe had been afforded a truly meaningful hearing of technological and economic matters. It also said that proceedings on the plan "occurred over sixteen months ago, before the general concern about the energy crisis and before certain problems with sulfur oxide control equipment had been fully documented" (481 F.2nd at p. 9). Consequently the Court instructed the EPA to "*either* (a) refrain from imposing any penalties on *these companies* during the pendency of their state administrative and judicial actions,[20] so long as such actions are pursued by the companies in good faith and with due diligence, or (b) afford the companies a limited legislative hearing" (481 F.2d at p. 10). As indicated in the above quotation, the Court held that relief through Section 307(b)(1) proceedings would be accorded only to those companies that had filed them.

held that Section 307(b)(2) prohibits raising technological and economic factors in an enforcement proceeding. And the Third Circuit itself so interpreted the *Getty* decision in its later decision of *Duquesne Light Co. v. EPA* (Vol. 4 of CCH Pollution Control Guide 16,133 at page 16,135—cited 1 PCG para. 15,141—3rd Cir. decided August 21, 1975.) Section 307(b)(2)—42 U.S.C. Section 1857h-5(b)(2) says that "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

[20] The opinion did not clearly delineate the nature of the state actions.

Pursuant to the Third Circuit's ruling in the first *Duquesne* case discussed above, the EPA elected to conduct an administrative hearing on the feasibility of the Pennsylvania plan. *St. Joe Minerals Corp. v. Environmental Protection Agency*, 508 F.2d 743, at p. 745 (1975). As a result of that hearing the EPA concluded that the sulfur provisions in the federally approved Pennsylvania plan are "technologically infeasible" as applied to St. Joe's smelter (p. 745). However the EPA refused to disapprove the plan for that, or any other, reason on the theory that the Clean Air Act Amendments did not permit it to do so.

The Third Circuit held that disapproval by the EPA of an implementation plan for technological reasons was not barred by the Act, and it remanded the case to the EPA for action consistent with its opinion. The EPA filed a petition for writ of certiorari in this Court (No. 74-1650). However, it thereafter filed a motion to defer consideration of the petition on the ground that the case would probably soon become moot.

Duquesne Light Co. v. Environmental Protection Agency (No. 72-542 decided August 21, 1975 and reported in Vol. 4 of CCH's Pollution Control Guide at para. 15,141 (pages 16,133 et seq.—but cited as 1 PCG par. 15,141)) is the fourth and last of the Third Circuit decisions. In this revisit to *Duquesne I*, the Court reviewed the EPA Administrator's determination, after a hearing of the affected utility plaintiffs, that the sulfur emission regulation constituted a valid and enforceable part of the Pennsylvania implementation plan. The Third Circuit posed the following two questions (at p. 16,134):

"1. Did the Administrator act arbitrarily in concluding that compliance with the challenged emission limitations within the time allowed by the plan is economically feasible for the petitioning utilities' coal burning electric generating plants through the use of flue gas desulfurization devices?

"2. Did the Administrator act arbitrarily when he concluded that conformity with the sulfur oxide emission limitations by the petitioners' coal burning generators was ~~technogolically~~ technologically feasible?"

The Court then discussed at length the economic and technological factors, which had arisen since initial EPA approval of the Pennsylvania plan, and which are very similar to those on which Union Electric bases its case before this Court.

The Third Circuit held (at p. 16,142) that

". . . the matter will be remanded to the Administrator for further consideration of the economic feasibility of the sulfur oxide emission regulations in the Pennsylvania plan and for a determination of a reasonable date for compliance by the petitioning utilities. The Administrator is also directed to evaluate the technological feasibility of the emission restrictions in light of more recent developments."

Appalachian Power Company v. Environmental Protection Agency, 477 F.2d 495 is a 1973 decision by the Fourth Circuit. In that case two utilities and a steel company filed Section 307 (b)(1) petitions for review of EPA approval of Virginia and West Virginia implementation plans. All of such petitions had been filed within 30 days of approval. In holding that the EPA should certify to the Court for judicial review the full administrative record (including the record of the state proceedings to formulate the plans), the Court said (1) that the state authorities were required to hear and consider technological and economic matters, (2) that the EPA must review the state authorities' findings on those matters and (3) that the Court on judicial review should inquire whether those matters had been sufficiently considered and properly resolved. The Court indicated that, if the certified record was insufficient, petitioners could present a motion (under Section 307(c)—42 USC Section 1857h-5(c)) to remand the matter to the EPA to take additional testimony.

In *Buckeye Power, Inc. v. Environmental Protection Agency*, 481 F.2d 162 (6th Cir. 1973), several utilities filed Section 307 (b)(1) petitions within the 30 day period to review on technological and economic grounds the EPA's approval of sulfur regulations in Ohio and Kentucky implementation plans. The Court held that before approving the plans the EPA should have held "legislative" type hearings, pursuant to Section 553(c) of the Administrative Procedure Act (5 U.S.C.—Pub. L. 89-554 (1966))—page 171 of opinion. It further held that such hearings would be inadequate as to individual claims. Consequently it said that such claims could be asserted in either federal or state enforcement proceedings (p. 173). This question of the scope of enforcement proceedings will be considered more fully in our discussion of the next case we cite.

In the *Buckeye* case the Sixth Circuit confronted face on (a) the claim that the Clean Air Act Amendments constitute "technology forcing" legislation and (b) the Senate Committee's statement that "existing sources of pollutants should meet the standard of the law or be closed down" (481 F.2d at p. 168).[21] With respect to those matters the Court said:

"No such language is contained in the Act, but if such language is given effect the electric utility plants in Ohio and Kentucky would be closed down and possibly those throughout the United States. If Congress intended such a

[21] Pages 2-3 of S. Rep. No. 91-1196, 91st Cong., 2nd Sess. (1970).

far-reaching result in the 1970 Amendments to the Act, it certainly would have mentioned such intention in the body of Amendments." (481 F.2d at p. 168)

The Sixth Circuit, in answering the EPA claim that technological and economic factors are irrelevant, said (481 F.2d at p. 169):

> "We find the Agency's argument that technological feasibility, high cost benefit, and resource unavailability are irrelevant under the 1970 Amendments, devoid of merit."

Indiana & Michigan Electric Co. v. Environmental Protection Agency, 509 F.2d 839 (1975) was a Seventh Circuit decision by a rather unusual panel. Retired Associate Justice Tom C. Clark of the United States Supreme Court and Senior District Judge William J. Campbell of the Northern District of Illinois, who wrote the opinion, sat by designation. The third member of the panel, Senior Circuit Judge Robert J. Kiley, deceased, did not participate in the decision.

In this case the petitioning utilities sought within the 30 day period a Section 307(b)(1) review of the EPA's approval of the Illinois and Indiana implementation plans. As in cases we have previously discussed, judicial review of the plan's sulfur regulations was sought on technological and economic grounds. The Seventh Circuit held that Section 110 of the Clean Air Act Amendments (42 U.S.C. Section 1857c-5) did not permit judicial review of those grounds. It also held, contrary to the *Buckeye* decision, that the EPA was not required to give petitioners a "legislative" hearing of the type set forth in the Administrative Procedure Act (5 U.S.C. Section 553(c)).

However, the Seventh Circuit did hold that "arguments concerning technology and economic impact . . . may be raised in the course of enforcement proceedings under Section 113(b)" (p. 847 of opinion). In so holding the Court noted that such an interpretation of the Act would lay at rest petitioners' claims

that a construction of Section 110 to prohibit them from raising technological and economic factors in a Section 307(b)(1) proceeding would be a denial of due process of law.

The Seventh Circuit's decision that technological and economic claims could be presented only in an enforcement proceeding was based in part on the thought that in those proceedings, apparently contrary to Section 307(b)(1) proceedings, the Court could consider the situation of the individual claimant and its particular emission source or sources (p. 845). In this connection we point to the Third Circuit's holding that only parties to Section 307(b)(1) proceedings, and presumably their affected emission sources, are governed by the Court's decision. See *Duquesne Light Co. v. Environmental Protection Agency*, 481 F.2d 1, at p. 10. Also we might mention that the case before this Court is being brought by Union Electric alone and only as to its Labadie, Sioux and Meramec plants (A.8).

Before leaving the *Indiana & Michigan* decision, we want to mention a significant part of the Congressional history of the Act, which was not referred to in the Seventh Circuit's opinion. On page 41 of the Senate Report[22] the Committee says "Of course, the person regulated would not be precluded from seeking such (judicial) review at the time of enforcement insofar as the subject matter applies to him alone." (matter in parentheses added) Section 308 (the judicial review section) of Senate Bill 4358, which the Senate Committee was then discussing, did not (like the Conference substitute actually enacted) include a provision that review could *not* be obtained in an enforcement proceeding, if it could be obtained in a review proceeding before the Court of Appeals. This later restriction became a part of the Act after conference.[23] We respectfully submit that this Congres-

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[22] See the citation in footnote 11 above.

[23] Section 307 (b)(2)—42 U.S.C. Section 1857h-5(b)(2) says "Action of the Administrator with respect to which review could be obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

sional history demonstrates a legislative intent that judicial review as it applies to the individuals regulated must be obtained in a Section 307(b)(1) review proceeding, rather than in a Section 113 enforcement proceeding.[24]

In concluding our discussion of the foregoing decisions, we point out that each of the Circuits held that the Clean Air Act Amendments must be interpreted as permitting judicial consideration of technological and economic factors *at some time*. And as the decisions clearly demonstrate, each of the Circuits felt that, in reaching a proper interpretation, there was no doubt but that Constitutional due process required such a judicial consideration.

We respectfully submit that this authority demonstrates that the Eighth Circuit's lone conclusion that the question is political and, therefore, that the parties affected by it[25] have been stripped of constitutional protection is an untenable interpretation which is contrary to our Anglo-American system of jurisprudence.

B. **Governing provisions of the Clean Air Act Amendments and their Congressional history call for the interpretation of the Act set forth in Point II above.**

The relevant part of Section 307(b)(1) says that

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the *appropriate circuit* . . . within 30 days from the date of

[24] This was also the holding in the *Getty* case, 467 F. 2d 349 (3rd Cir. 1972).

[25] Violations of implementation plans are subject to civil and criminal penalties (including jail sentences and large daily fines) and are also subject to citizen's suits. Sections 113 and 304—42 U.S.C. Sections 1857c-8 and 1857h-2.

> such promulgation, approval, or action, *or after such date if such petition is based solely on grounds arising after such 30th day.*" (emphasis added)

Obviously Congress intended that the foregoing provision, including particularly the emphasized part, had some meaning. Indeed the Eighth Circuit felt the same way and, therefore, engaged in a search to find a meaning.[26] Apparently the best it could do was to place its reliance on the following statement at page 42 of the Senate Report.[27]

> "New information may become available at some future date which indicates that a particular pollution agent or combination of agents is hazardous to the health of persons and therefore should be added to those pollution agents subject to the provisions of section 115. Conversely, new information may become available indicating that a pollution agent for which a prohibition had been established under section 115 is not hazardous to the health of persons. If the Secretary (Administrator) failed to act in either event, the promulgation could be challenged."[28] (matter in parentheses added)

The Eighth Circuit held (1) that the foregoing paragraph requires that the "new information" relate to the question of whether and to what extent a certain pollutant is a health hazard, (2) that, since this would be a challenge to a national air quality standard, the matter must first be presented to the Administrator and (3) that a Section 307(b)(1) petition for review of the

[26] Page A-23 of Appendix A to the petition for certiorari.

[27] Cited in footnote 11.

[28] As discussed later, we think this quoted paragraph should be examined in conjunction with the paragraph preceding it and that such an examination leads to a different view of the Act as it applies to our case. However, at this point we are dealing only with the Eighth Circuit's view of the matter.

Administrator's finding could then be filed only in the United States Court of Appeals for the District of Columbia.[29]

We respectfully submit that the Eighth Circuit's decision does *not* set forth an example of an instance where a petition to review an *implementation plan* has been filed in the *appropriate circuit* on grounds arising more than 30 days after EPA approval of the plan. And we still believe that Congress intended for those provisions to have some meaning. However, we have not read of, nor have we been able to imagine, a serious and realistic example of a situation where those provisions would be given effect, if the Eighth Circuit's opinion were followed. We therefore respectfully submit that from a reading of the applicable words of the section, and the utilization of the customary meaning of those words, one must inexorably reach the conclusion that technological and economic factors fall within the meaning of "grounds" arising after EPA approval.

The word "review", as used in Section 307(b)(1), also seemed to trouble the Eighth Circuit.[30] We do not believe that that word is a word of art, as the Eighth Circuit seems to indicate. Additionally we think it should be interpreted in the context in which it is used, and in doing so we have no difficulty in including technological and economic matters as "grounds" within the meaning of the statute.

As we previously pointed out (p. 21 of this brief), on p. 41 of the Senate Report[31] the Committee said:

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[29] Pages A-24 and 25 of Appendix A to the petition for certiorari. In the later case of *Oljato Chapter v. Train*, 515 F.2d 654, at pp. 665-6 (1975), the Court of Appeals for the District of Columbia, in following the Eighth Circuit, questioned whether such a statutory interpretation "flows inexorably" from the Senate Report, but stated that the interpretation makes good sense, is consistent with the statutory scheme and, as to requiring an initial decision by the Administrator, falls within the Court's "inherent powers."

[30] Page A-7 of Appendix A to the petition for certiorari.

[31] Cited in footnote 11.

> "Of course, the person regulated would not be precluded from such (judicial) review at the time of enforcement insofar as the subject matter applies to him alone." (matter in parentheses added)

Such a statement seems quite proper in view of the fact that the judicial review section of the Senate bill (Section 308) did not preclude a person, who filed a petition for review in the Court of Appeals, from presenting relevant material in his own defense in a later enforcement proceeding.

However, the Conference substitute for the Senate bill did include such a preclusionary provision, and that provision is now the law (Section 307(b)(2)). The Senate Report, we submit, clearly shows a Congressional intent that a person should *at some time* be accorded a judicial hearing of relevant material particularly applicable to him. And, in view of the Conference substitute for the Senate bill, this judicial hearing must now be accomplished by a petition filed in the Court of Appeals. The impossibility of a person complying with requirements of an implementation plan because of recent technological and economic developments should, we submit, clearly be considered as falling within the scope of the Committee's designation of a "subject matter" applying particularly to the regulated person.

On page 41 of the Senate Report to which we have referred, the Senate Committee said:

> "The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any

promulgated implementation plan after the date of promulgation *whenever it is alleged that significant new information has become available.*" (emphasis added)

In the next paragraph of the report the Committee set forth as an example of "new information" developments or data which might require that new pollutants be added to, or existing pollutants deleted from, the list of health hazardous pollutants called for by Section 115 of the bill.

The Eighth Circuit thought that this *example* of "new information" constituted the only information falling within the Congressional intent.[32] However, we respectfully submit that new information concerning the hazardous nature of pollutants is merely *one* example of "significant new information." In addition to comporting with a common sense view of the matter, we point out that information concerning pollutants would call for review of action under Section 115 of the proposed Senate bill *only*, whereas the quoted part of the Committee Report and the judicial review section of the proposed Senate bill (Section 308) also provide for review because of "significant new information" relating to implementation plans. And implementation plans were provided for by Section 111 (not 115) of the proposed Senate bill.

The above quoted paragraph from the Senate Report refers to new information in the area of protection of "public health and environmental quality." Apparently the Eighth Circuit thought that new information concerning pollutants and their hazardous character was the only type of information which could be considered as falling within the meaning of this phrase.[33] We respectfully submit that this is far too restrictive an interpretation of the phrase. Certainly there are many

[32] Pages A-24 and 25 of Appendix A to the petition for certiorari.

[33] Pages A-23 to 25 of Appendix A to the petition for certiorari.

things that can happen in the future which will affect the "public health and environmental quality." Some of them may improve it; and some of them may worsen it. In any event common sense tells us, and assuredly Congress knew, that technological and economic developments may have an extremely important affect, for better or worse, on public health and environmental quality.

We are quite aware of the argument that the Clean Air Act Amendments constitute "technology forcing" legislation. In fact on pages 2 and 3 of the Senate Report[34] the Committee said:

> "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
>
> "Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . ."

As a matter of fact this Court itself has referred to the "technology forcing" character of the Amendments.[35] It seems to us, however that the concept of technology forcing legislation is somewhat alien to the Anglo-American system of jurisprudence. The idea of forcing a person to close down his business or go to jail (or pay high daily fines), unless science evolves a

[34] Cited in footnote 11.

[35] *Train v. Natural Resources Defense Council*, 421 U.S. 60, at p. 91 (1975).

suitable technology, seems abhorrent to us in the absence of an overriding public interest.[36] We are also aware of some statements that if a person can not meet the standards within the time allowed he can "take his case" to Congress. But Congress simply does not have the flexibility to deal with such matters. Additionally Congress is not a Court and should not be treated as one.

The idea that if enough money is spent on a scientific project it can inevitably be achieved is simply not true. Moreover the question of obtaining money for research and development is not easily resolved. Money for such purpose, so far as an electric utility is concerned, must come from investors or customers or both. There is, of course, no law requiring an investor to put his money in one business rather than another. And an examination of the prices of electric utility stocks for the past 10 years demonstrates that they have not held a great attraction for investors. As to customers, the rates of practically all electric utilities are determined by state commissions, and they generally seem to think that rates are high enough without charging extensive amounts for research purposes.

We respectfully submit that the Sixth Circuit in the *Buckeye* case[37] was correct in noting that the Act itself does not say anything about shutting down the electric utilities, and as the Court there said, Congress would surely have said so, if that had been its intention. Moreover, as we previously pointed out, the Clean Air Act Amendments were enacted with the Congres-

[36] Quite likely there would be such a public interest, if we were dealing with poisonous air. But we are not. Sections 110(e) and (f)—42 U.S.C. Secs. 1857c-5(e) and (f) provide for variances from the primary standards under somewhat political conditions; this Court in the *Train* case, cited in footnote 35, allowed variances which do not interfere with the national standards; and the petition in the instant case (A. 13-15) says that compliance with the sulfur regulation is not required to meet the national standards.

[37] 481 F.2d 162, at p. 168.

sional idea that more electric energy could be generated by gas if need be.[38] But Congress quite wisely realized that conditions might change and provided for that possibility in permitting judicial review on the basis of grounds arising after EPA approval of an implementation plan.

We submit that a sensible interpretation of both the words of Section 307(b)(1) and its history demonstrate that those grounds include significant new information relating to technological and economic factors. And those are the factors which the petition alleges in the instant case (A. 7-8).

C. **Only an interpretation of Section 307 (b)(1) of the sort set forth in Point II of this Argument will fulfill the United States constitutional requirement of due process.**

The principle that an Act of Congress must be construed in a constitutional, rather than an unconstitutional, manner when reasonably possible is firmly established by decisions of this Court.[39] There are, of course, a multitude of decisions of this, and other, Courts dealing with the provision in the Fifth Amendment to the United States Constitution, which says that "No person shall . . . be deprived of . . . property without due process of law . . ." We do not, however, think it necessary to go into those decisions other than to the limited extent in which they directly affect this case.

In the *Getty* case[40] the Third Circuit said:

[38] See page 2 of the Senate Report cited in footnote 11.

[39] See *Phelps v. U.S.*, 274 U.S. 341, at p. 343 (1927) and *Howard v. Illinois Central Railroad Company*, 207 U.S. 463, at p. 501 (1908). See also the recent decision of the Ninth Circuit applying this principle to the Clean Air Act Amendments. *Brown v. Environmental Protection Agency*, 1 PCG par. 15,142 (9th Cir. decided August 15, 1975)

[40] 467 F.2d 349, at p. 356 (3rd Cir. 1972).

"The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. 'The formality of procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' Boddie v. Connecticut, 401 U.S. 371, at 378 . . ."

With respect to the importance of the interests involved in this sort of litigation, we refer to the concurring opinion of Circuit Judge Clark in *Texas v. Environmental Protection Agency*, 499 F.2d 289 (5th Cir. 1974) and the opinion of Chief Judge Gibson in the instant case: In the *Texas* case, Circuit Judge Clark said (at p. 322):

"The subject matter of this action involves the health and welfare of millions of citizens, the continued business vitality of tens of thousands of firms and compliance expenditures costing billions of dollars.

"These extensive rights deserve a more orderly process of judicial reflection."

In the instant case, Chief Judge Gibson said (page A-22 of Appendix A to the petition for certiorari) that the matters asserted in the petition for review are "important" ones which are matters of concern to "almost all citizens in this country".

If we were dealing with matters presenting a clear and present danger to our citizens, such as poisonous air, or the probability of it, there could well be quite different due process (and thus hearing) considerations. But that is *not* the situation here. To the contrary, as we have previously pointed out, we are dealing with air that meets the national ambient air quality standards.

We therefore submit that a constitutional interpretation of the Clean Air Act Amendments requires *at some time* judicial

consideration (and a hearing) of the technological and economic factors we are presenting.[41]

As we see it, there are three methods by which this constitutional requirement can be met. First there is the procedure which we advocate, namely, the appointment by the Eighth Circuit of a Master to hear evidence and make findings which would thereafter be reviewed by the Court. In our opinion an interpretation of the Act in this manner reflects most clearly the Congressional intent and also meets constitutional due process requirements.

Two somewhat practical complaints can be presented respecting this procedure. In the first place it may be pointed out that there is a serious disinclination toward the placement of an original jurisdiction in the Courts of Appeal. With respect to that objection, we note that it is substantially ameliorated by the appellate court's appointment of masters. Secondly, one might claim that the Court of Appeals would not have the benefit of the EPA's expertise. We respond to that by noting that the EPA would be a party and could as such present its evidence and views.

A second interpretation of the Act, which meets due process requirements, would call for the presentation of technological and economic factors in enforcement proceedings. We have already set forth our view of Congressional intent concerning such a procedure and will not repeat it here. One practical complaint that can be made relates to a lack of judicial ability to call on the EPA's expertise, because Section 113 (a)(4)—42 U.S.C. Section 1857c-8(a)(4) which calls for a conference with the Administrator, does not legally provide for, nor practically result in, any sort of a "hearing." But again we point out that

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[41] See for instance the *Getty* decision (467 F.2d 349, at p. 356) and the *Indiana & Michigan* decision (509 F.2d 839, at p. 847).

the EPA would be a party to the enforcement proceeding and could as such present its evidence and views.

A third interpretation of the Act would entail a remand to the EPA (perhaps under Section 307(c)) to take evidence on those technological and economic matters, which would subsequently be reviewed by the Eighth Circuit. In the present posture of the case, this would require a remand by this Court to the Eighth Circuit for the purpose of entertaining such a motion by petitioner. Obviously this sort of a procedure avoids by-passing the EPA. We do think, however, that it would come close to a judicial re-writing of the Clean Air Act Amendments. Of course one question would be whether the hearing before the EPA should be adjudicatory or rule-making in nature. Although we may now be getting away from the thrust of our brief, we would think the importance of the matter and the individual nature of the claims would point toward the adjudicatory type of hearing.

But we again repeat the view first expressed that the clearest indications of Congressional intent we have (viz. the provisions of the Act itself and their Congressional history) point toward a hearing by the Eighth Circuit on the record made by its appointed master. Additionally such an interpretation meets constitutional requirements of due process.

CONCLUSION

The specific relief which we pray from this Court is that it remand the case to the United States Court of Appeals for the Eighth Circuit with instructions to appoint a Master for the purpose of taking testimony and making findings on the allegations in paragraphs 21 through 24 and 26 of Union Electric's petition as amended (A. 7-8). Such Court shall thereafter decide the case on the basis of the master's report and the request in the second prayer of the petition. (A. 8).

Respectfully submitted

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No. 74-1542

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	8
Argument:	
Upon judicial review of the EPA Administrator's approval of a state implementation plan under the Clean Air Act, the court may not consider claims that it is economically or technologically infeasible to comply with the state plan	11
A. Petitions for review under Section 307(b)(1), whether filed before or after 30 days from the date of the Administrator's approval of a state plan, can be based only on grounds that the Administrator would have had to consider in approving the plan	12
B. The Administrator is not authorized to refuse to approve a state implementation plan on grounds of economic or technological infeasibility, and a court reviewing the Administrator's action therefore cannot set aside his approval on those grounds	14

599-797—75——1

C. The court should not decide in this case whether, as petitioner contends, due process requires that there be some opportunity in some judicial proceeding for infeasibility claims to be considered ---------- 33
Conclusion ---------- 37

CITATIONS

Cases:

Appalachian Power Co. v. *Environmental Protection Agency*, 477 F. 2d 495------- 23, 30
Duquesne Light Co. v. *Environmental Protection Agency*, (*Duquesne II*), 522 F. 2d 1186, petition for a writ of certiorari filed November 19, 1975 (No. 75–736)--- 31
Indiana & Michigan Electric Co. v. *Environmental Protection Agency*, 509 F. 2d 839 ---------- 16, 23, 27, 35
Natural Resources Defense Council v. *Environmental Protection Agency*, 507, F. 2d 905---------- 16, 18, 23
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 ---------- 32
South Terminal Corp. v. *Environmental Protection Agency*, 504 F. 2d 646---- 16, 23, 25
St. Joe Minerals Corp. v. *Environmental Protection Agency*, 508 F. 2d 743, petition for a writ of certiorari filed June 28, 1975 (No. 74–1650)---------- 23
Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60---------- 4, 15, 17, 18, 20, 24, 26, 27, 28, 30, 31, 32
Udall v. *Tallman*, 380 U.S. 1---------- 32

Constitution, statutes and regulations:

United States Constitution, Fifth Amendment ---------- 33
Air Pollution Act of 1955, 69 Stat. 322---- 19
Air Quality Act of 1967, 81 Stat. 485------ 19
Section 107 (81 Stat. 490)---------- 20
Section 108 (81 Stat. 491)---------- 20
Section 108(c)(1) (81 Stat. 492)---- 20
Clean Air Act of 1963, 77 Stat. 392------ 19
Clean Air Act, 77 Stat. 392, as amended by the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857 *et seq.*:
Section 102, 42 U.S.C. 1857a--------- 4
Section 107(a), 42 U.S.C. 1857c–2(a)- 26
Section 108(a)(1), 42 U.S.C. 1857c–3 (a)(1) ---------- 3
Section 108(b)(1), 42 U.S.C. 1857c–3 (b)(1) ---------- 20
Section 109(b)(1), 42 U.S.C. 1857c–4 (b)(1) ---------- 2
Section 109(b)(2), 42 U.S.C. 1857c–4 (b)(2) ---------- 2
Section 110, 42 U.S.C. 1857c–5----- 2, 11, 20
Section 110(a), 42 U.S.C. 1857c–5(a)- 3, 27
Section 110(a)(1), 42 U.S.C. 1857c–5(a)(1) ---------- 31, 33
Section 110(a)(2), 42 U.S.C. 1857c–5 (a)(2) -- 2, 3, 9, 11, 15, 16, 17, 18, 23, 28, 31
Section 110(a)(2)(A)---------- 20, 29
Section 110(a)(2)(B), 42 U.S.C. 1857c–5(a)(2)(B) ---------- 9, 25, 27
Section 110(a)(2)(A)–(H), 42 U.S.C. 1857c–5(a)(2)(A)–(H) -------- 3, 15, 27
Section 110(a)(2)(A)(i)---------- 17
Section 110(a)(3), 42 U.S.C. 1857c–5 (a)(3) ---------- 6, 24, 32

Statutes and regulations—Continued
Clean Air Act—Continued

Page

Section 110(c), 42 U.S.C. 1857c-5(c)-- 3, 25
Section 110(d), 42 U.S.C. 1857c-5(d)- 3
Section 110(e), 42 U.S. C. 1857c-5(e)- 17, 31
Section 110(f), 42 U.S.C. 1857c-5(f)- 17, 31
Section 111(a)(1), 42 U.S.C. 1857c-6 (a)(1) ---------- 18
Section 111(a)(2), 42 U.S.C. 1857c-6(a)(2) ---------- 18
Section 113, 42 U.S.C. 1857c-8----- 3, 35, 36
Section 113(a)(1), 42 U.S.C. 1857c-8(a)(1) ---------- 35
Section 113(a)(4), 42 U.S.C. 1857c-8(a)(4) ---------- 35, 36
Section 113(b), 42 U.S.C. 1857c-8(b)- 35
Section 116, 42 U.S.C. 1857d-1------- 9, 25, 26, 27, 30
Section 202, 42 U.S.C. 1857f-1-------- 18
Section 211(c)(2)(A), 42 U.S.C. 1857f-6c(c)(2)(A) ---------- 18
Section 231, 42 U.S.C. 1857f-9-------- 18
Section 307(b)(1), 42 U.S.C. 1857h-5 (b)(1) ---------- 2, 3, 5, 7, 9, 11, 12, 13, 14, 31, 32, 33, 36
Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 *et seq*.---------- 14
Section 110(a)(3)(A), 42 U.S.C. 1857c-5(a)(3)(A) (88 Stat. 256)---------- 6, 27, 28
Section 110(a)(3)(B), 42 U.S.C. 1857c-5(a)(3)(B) (88 Stat. 256)---------- 14
Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992---------- 19
87 Stat. 1676---------- 19

Statutes and regulations—Continued
Clean Air Act—Continued
Revised Missouri Statutes, Section 203.110

Page

(1972) ---------- 4, 34
40 C.F.R. Part 50---------- 3
40 C.F.R. 50.4---------- 4
40 C.F.R. 51.2(b) and (d)---------- 29
40 C.F.R. 51.3---------- 4
40 C.F.R. 51.13---------- 30
40 C.F.R. 52.1320, *et seq*.---------- 4-5
40 C.F.R. 52.1321---------- 4
40 C.F.R. 52.1332---------- 4
Miscellaneous:
Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources,* 89 Harv. L. Rev. 316 (1975)---------- 18, 27, 30
Bonine, *Evolution of 'Technology-Forcing' in the Clean Air Act,* Environmental Reporter, Monograph No. 21 (July 25, 1975) ---------- 18
116 Cong. Rec. 16107 (1970)---------- 29
116 Cong. Rec. 32901-32902 (1970)------- 21
116 Con. Rec. 32919 (1970)---------- 21
116 Con. Rec. 33115 (1970)---------- 21
116 Cong. Rec. 42382 (1970)---------- 29
Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess. (1972)------ 22
H.R. 17255, 91st Cong., 2d Sess. (1970)---- 19
H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970)---------- 19

Miscellaneous—Continued
Legislative History of the Clean Air Amendments of 1970, Senate Committee on Public Works, 93d Cong., 2d Sess. (1974):
Page
Vol. 1, pp. 111, 123, 151 ---------- 19
Vol. 1, pp. 357–358, 392–393, 531 ------ 19
Vol. 1, pp. 401, 402–403 ---------- 20
Vol. 2, p. 910 ---------- 19
S. 4358, 91st Cong., 2d Sess. (1970) ------- 19
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) ---------- 20

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–26) is reported at 515 F. 2d 206.

JURISDICTION

The judgment of the court of appeals (Pet. App. A–27) was entered on March 27, 1975. The petition for a writ of certiorari was filed on June 9, 1975, and was granted, limited to the first question presented by the petition, on October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon review of the EPA Administrator's approval of a state implementation plan under the Clean Air Act, the court may consider claims that it is economically or technologically infeasible to comply with the state plan.

STATUTES INVOLVED

Sections 110(a)(2) and 307(b)(1) of the Clean Air Act, as amended by the Clean Air Amendments of 1970, 84 Stat. 1680, 1708, 42 U.S.C. 1857c–5(a)(2) and 1857h–5(b)(1), are set forth in an appendix to the Memorandum for the Respondent.

STATEMENT

Pursuant to Section 110 of the Clean Air Act, as amended, 42 U.S.C. 1857c–5, each State is required to adopt and submit to the Administrator of the Environmental Protection Agency (EPA) an implementation plan providing for the attainment, maintenance and enforcement of the national "primary" and "secondary" ambient air quality standards promulgated by the Administrator. National primary standards are air quality standards that, in the Administrator's judgment, are "requisite to protect the public health," while secondary standards are those "requisite to protect the public welfare." Sections 109(b)(1) and 109(b)(2), 42 U.S.C. 1857c–4(b)(1) and 1857c–4(b)(2). The Administrator must approve or disapprove a state implementation plan within four months of its

submission. Section 110(a)(2), 42 U.S.C. 1857c–5(a)(2). If he determines that the plan meets the requirements of Section 110(a)(2)(A)–(H), 42 U.S.C. 1857c–5(a)(2)(A)–(H), he is required to approve the plan. If he finds the state plan deficient, he must disapprove it and, after giving the State an opportunity to revise the plan, propose and promulgate his own regulations correcting the deficiency. Section 110(c), 42 U.S.C. 1857c–5(c).[1]

On April 30, 1971, the Administrator promulgated national primary and secondary standards for sulfur dioxide and five other air pollutants that were found to have an adverse effect on the public health and welfare. See Section 108(a)(1), 42 U.S.C. 1857c–3(a)(1); 40 C.F.R. Part 50. Petitioner, who operates coal-burning electric power plants that emit sulfur dioxide, did not seek judicial review of the standards, although entitled to do so under Section 307(b)(1) of the Act, 42 U.S.C. 1857h–5(b)(1), by filing a petition for review within 30 days in the United States Court of Appeals for the District of Columbia Circuit.

The State of Missouri thereafter submitted its implementation plan to the Administrator for the attainment of national ambient air quality standards in each of the State's five air quality control regions.

[1] An implementation plan that either is promulgated by the State and approved by the Administrator, Section 110(a), 42 U.S.C. 1857c–5(a), or is promulgated by the Administrator, Section 110(c), 42 U.S.C. 1857c–5(c), becomes the "applicable implementation plan," Section 110(d), 42 U.S.C. 1857c–5(d), which is enforceable by the Administrator. Section 113, 42 U.S.C. 1857c–8.

599-797—75——2

Prior to this submission, the Administrator had determined that the levels of sulfur dioxide in the State's ambient air exceeded primary standards in only one region—the Metropolitan St. Louis Interstate.[2] 40 C.F.R. 52.1321; see 40 C.F.R. 50.4, 51.3. Accordingly, the State of Missouri's implementation plan included a control strategy and regulations designed to limit emissions of sulfur dioxide from sources in that region.[3] The emission limitations in the plan were immediately effective, but the State retained the authority to grant variances to particular sources which could not immediately comply with the requirements. See Section 203.110, Revised Statutes of Missouri (1972) (note 33, *infra*); cf. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 69. The implementation plan was explicitly designed to attain primary (as well as secondary) national ambient air quality standards for sulfur dioxide in the Metropolitan St. Louis Interstate region by July 1975, see 40 C.F.R. 52.1332, which was approximately three years after the Administrator's deadline for approving or disapproving the plan.

On May 31, 1972, the Administrator approved the provisions of the plan at issue here. See 40 C.F.R.

[2] A portion of this region is located in Illinois and is subject to regulation by that State. See Sections 102 and 110(a)(2)(E), 42 U.S.C. 1857a and 1857c-5(a)(2)(E).

[3] Many of the regulations, including the regulation at issue in this case, have been in effect as state regulations since March 24, 1967. These regulations were simply incorporated into the plan submitted for EPA's approval under the 1970 Act.

52.1320, *et seq.* Although petitioner's three electric power generating plants in the Greater St. Louis area were subject to the sulfur dioxide restrictions contained in the Missouri implementation plan, petitioner did not seek judicial review of the Administrator's approval of the plan, as it was entitled to do under Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), by filing within 30 days a petition for review in the court of appeals for the appropriate circuit. Instead, petitioner applied to the appropriate State and county agencies for variances from the emission limitations affecting its plants. Under Missouri law, a variance may be granted for a maximum one-year period, but the variance may be renewed for successive one-year periods upon reapplication by the source. Petitioner had received variances for its three plants, and was applying for a renewal of these variances (see A. 5; Pet. App. A-3, and n. 7),[4] When, on May 31, 1974, the Administrator notified petitioner that its plants were violating the emission limitations for sulfur di-

[4] The variance for petitioner's Labadie plant expired March 28, 1974; the reapplication was filed with the Missouri Air Conservation Commission on March 25, 1974 (and amended on May 7, 1974). The variance for the Sioux plant expired on July 24, 1974, and the reapplication was filed with the Commission on July 19, 1974. Application for a variance for petitioner's Meramec plant was filed with the St. Louis County Air Pollution Control Appeal Board on April 15, 1974. The prior variance for the Meramec plant had expired September 30, 1972. See generally note 33, *infra*, in regard to Missouri's variance process.

oxide contained in the plan.[5] Petitioner then filed the petition at issue in this case in the United States Court of Appeals for the Eighth Circuit, for review of the Administrator's approval in 1972 of the Missouri plan (A. 2–9). The applications for variances pending before the State and county agencies have been tabled until this litigation is resolved.

In its petition for review, petitioner alleged (1) that it faced various economic and technological difficulties in complying with the sulfur dioxide regulations,[6] (2) that sulfur dioxide in the ambient air should no longer be regarded as a health hazard, and (3) that compliance with the state regulations is not necessary for attainment or maintenance of national primary ambient air quality standards in the St. Louis metropolitan area. By claiming that all of these grounds arose more than 30 days after the Administrator's approval of the plan, petitioner attempted to

[5] In regard to the Administrator's enforcement role, see note 1, *supra;* note 34, *infra.* The notice included the Sioux plant, even though the variance for that plant had not expired, because the variance had not been submitted to EPA as a plan revision under Section 110(a)(3) and was therefore not a part of the applicable implementation plan.

[6] More specifically, petitioner alleged (see A. 7–8; Pet. App. A–4, n. 8) that (1) the oil embargo and other economic factors had resulted in such shortages of and high prices for the necessary low-sulfur coal that requiring its use was against the public interest; (2) that adequate sulfur dioxide removal equipment has not been developed; (3) that such equipment is costly; and (4) that petitioner's purchase of such equipment could not realistically be financed.

invoke the provision of the Act permitting a petition for judicial review to be filed more than 30 days after the Administrator's approval of an implementation plan when the petition is "based solely on grounds arising after such 30th day." Section 307(b)(1), 42 U.S.C. 1857h–5(b)(1).

The court of appeals granted motions filed by the Administrator and certain intervenors[7] to dismiss the petition for review for lack of jurisdiction. The court held that Section 307(b)(1) of the Act authorized it to set aside the Administrator's approval of an implementation plan only on grounds—whether arising before or after 30 days from the approval date—that would have required the Administrator to disapprove the plan, and that the economic and technological claims made by petitioner did not constitute such grounds (Pet. App. A–8 to A–24). In light of this holding, the court of appeals found it unnecessary to determine whether the petitioner's allegations of fact were well-founded or whether they arose more than 30 days after the Administrator's approval (Pet. App. A–6 to A–8, A–24).[8]

[7] The Attorney General of the State of Missouri and the Missouri Air Conservation Commission intervened as respondents in the action.

[8] With respect to petitioner's other claims, the court of appeals held that it had no jurisdiction over the claim that the regulations were unnecessary to attain national standards because, in view of the Act's recognition of state authority to adopt requirements more stringent than those needed to attain or maintain national standards, the Administrator could not withhold approval on that basis, and hence the court could not invalidate approval on that ground

SUMMARY OF ARGUMENT

The question in this case is whether a federal court of appeals, in reviewing the EPA Administrator's approval of a state implementation plan under the Clean Air Act, may consider claims that it is economically or technologically infeasible to comply with the plan's requirements. Since the subject of the courts' review in such cases is the Administrator's approval, the relevant inquiry is whether the Administrator is authorized to disapprove a state plan on the ground that it is infeasible. Contrary to petitioner's argument, this is true even when the petition for review is filed more than 30 days from the date of the Administrator's approval; such a petition must allege grounds which, had they been known or in existence at the time the Administrator approved the plan, would have prevented him from giving his approval. To hold otherwise would be inconsistent with the language of Section 307(b)(1), and would also have the unwarranted effect of imposing on federal appellate courts a sig-

(Pet. App. A-25 to A-26). Petitioner did not seek review of this holding in its petition for a writ of certiorari.

The court also held that petitioner's claim that sulfur dioxide is not the health hazard it was once thought to be was not properly before the court because that was effectively a challenge to the Administrator's promulgation of national standards for sulfur dioxide, which should be presented in the first instance to the Administrator and which, in any event, could be the subject of judicial review under the Act only in the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A-24 to A-25). See Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1). Petition raised this issue in its petition for a writ of certiorari as the fourth question presented (Pet. 3), but the Court granted the petition only as to the first question presented (Pet. Br. 3).

nificant responsibility for administering the Act and the implementation plans.

The Administrator must approve a state implementation plan if it satisfies the eight requirements of Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2). In pertinent part, Section 110(a)(2) requires the Administrator to examine state plans to see that they contain emission limitations necessary for the timely attainment of national ambient air quality standards. There is no requirement in Section 110(a)(2) that the Administrator consider whether compliance with these emission limitations is feasible. Indeed, the structure and history of the Act indicate that the Administrator must approve a plan which satisfies the requirements of Section 110(a)(2) even if it may be economically or technologically infeasible for some sources to comply with the plan's emission limitations.

The Administrator must approve a plan which complies with Section 110(a)(2)'s criteria even if the plan will achieve a higher quality of ambient air than required by the national standards. Under Section 116, 42 U.S.C. 1857d-1, States have the power to promulgate more stringent limitations than necessary to achieve national standards. And such limitations may be submitted to EPA as part of the state implementation plan. The term "necessary" in Section 110(a)(2)(B) means only that the plan must, at a minimum, contain the limitations needed to attain national standards. This view is supported by provisions of the Clean Air Act which show that Congress permitted state implementation plans to contain more stringent

limitations than necessary. And it is supported by the structure of the Act, which gives States a significant role in effectuating air pollution programs. The States are to make the important decisions regarding the imposition of emission controls; challenges to the wisdom of these decisions should therefore be to the appropriate state agency (as petitioner is doing in this case), and not to federal appellate courts.

Should this Court hold otherwise, EPA would be subjected to an impossible administrative burden which would jeopardize the timely attainment of even the minimum national standards. Congress could not have intended this result.

In light of the above, we submit that EPA's interpretation of the Act as not authorizing it to disapprove a plan on the ground that compliance may be infeasible for some sources—an interpretation which is entitled to great weight because of EPA's responsibility for administering the Act—should be upheld; neither petitioner nor *amici* have shown a compelling reason why that interpretation is incorrect. Since the Administrator may not disapprove a state plan on infeasibility grounds, federal courts of appeals reviewing the Administrator's approval of a state plan also may not consider such grounds.

Petitioner's claim that such a result deprives it of due process was not briefed in the court of appeals and is not a part of the first question presented in the petition for a writ of certiorari, the only question accepted for review by the Court. In any event, the

claim is premature. It rests on the premise that judicial consideration of feasibility factors must be available at some time. There are, however, other occasions when a state or federal court may consider claims of infeasibility. The question whether petitioner has a constitutional right to raise such claims in the context of these other judicial proceedings cannot appropriately be decided by the Court in this case.

ARGUMENT

UPON JUDICIAL REVIEW OF THE EPA ADMINISTRATOR'S APPROVAL OF A STATE IMPLEMENTATION PLAN UNDER THE CLEAN AIR ACT, THE COURT MAY NOT CONSIDER CLAIMS THAT IT IS ECONOMICALLY OR TECHNOLOGICALLY INFEASIBLE TO COMPLY WITH THE STATE PLAN

After the EPA Administrator approves a state implementation plan under Section 110 of the Act, 42 U.S.C. 1857c–5, his action is subject to review in the court of appeals pursuant to Section 307(b)(1), 42 U.S.C. 1857h–5(b)(1). The petition for judicial review must be filed within 30 days of the Administrator's approval unless it rests solely on grounds arising after that date. Regardless when the Section 307(b)(1) suit is begun, however, in our view certain claims may not be used as a basis for challenging the Administrator's approval of a state plan.

Thus, it makes no difference that petitioner here sought judicial review only after the 30-day period had expired: the question presented—whether claims of economic or technological infeasibility may be con-

599-797—75——3

sidered in Section 307(b)(1) suits—must be treated the same as if petitioner had filed within the 30-day period. In Part A of the argument that follows we explain why the issue in both situations depends on whether the Administrator has authority to refuse to approve an economically or technologically infeasible state implementation plan. In Part B, *infra,* we argue that under Section 110(a)(2) the Administrator has no such authority. Finally, in Part C, *infra,* we discuss petitioner's contention that the foregoing result may be a denial of due process.

A. PETITION FOR REVIEW UNDER SECTION 307 (b)(1), WHETHER FILED BEFORE OR AFTER 30 DAYS FROM THE DATE OF THE ADMINISTRATOR'S APPROVAL OF A STATE PLAN, CAN BE BASED ONLY ON GROUNDS THAT THE ADMINISTRATOR WOULD HAVE HAD TO CONSIDER IN APPROVING THE PLAN

Regardless of when the Section 307(b)(1) petition is filed in the court of appeals, the subject of judicial review is, as the statute says, "the Administrator's action in approving * * * [an] implementation plan * * *." Thus, to obtain review of the Administrator's approval of an implementation plan more than 30 days after the approval, the petitioner must allege "grounds" which, had they been known or in existence at the time the Administrator approved the plan, would have prevented him from giving his approval. If, as we argue in Part B, *infra,* economic and technological factors cannot be considered by the Administrator at the time of initial approval, such factors similarly have no bearing in a subsequent

challenge in the court of appeals—whether filed before or after expiration of the 30-day period. To hold otherwise not only would be inconsistent with the language of Section 307(b)(1) but also would contravene the purpose and policies underlying the Act.

Petitioner seems to suggest (Br. 13) that even if the EPA Administrator cannot consider economic and technological feasibility at the plan-approval stage, the same factors can later be raised in the court of appeals for the purpose of challenging his approval of the state plan, provided only that the events giving rise to the claims occurred more than 30 days after the EPA Administrator's action. But such a conclusion would make the federal appellate courts responsible for administering a significant part of the Act and the implementation plans, despite the fact that expert federal and state administrative systems exist for this purpose.[9] It would require, as the court of appeals stated, that the reviewing court "sit as a super-legislature balancing the necessity of compliance with the clean air standards against competing economic and technological considerations" (Pet. App. A–23). If, as we argue below, Congress did not intend the EPA Administrator to base his approval of a state plan on whether it would be feasible for

[9] As we discuss *infra*, pp. 17, 27–29, 33–36, claims of infeasibility, although not relevant to whether a plan will be approved (and therefore not relevant in a Section 307(b)(1) proceeding), can be considered and acted upon in other contexts in order to provide relief for a polluter who is unable to comply with the state plan's requirements.

polluters to comply, Congress could not have intended to thrust this task on the courts of appeals, whose responsibility under Section 307(b)(1) is to review the Administrator's approval, not to decide according to some unspecified standard that the state plan should be modified or rejected in light of economic or technological considerations.[10]

B. THE ADMINISTRATOR IS NOT AUTHORIZED TO REFUSE TO APPROVE A STATE IMPLEMENTATION PLAN ON GROUNDS OF ECONOMIC OR TECHNOLOGICAL INFEASIBILITY AND A COURT REVIEWING THE ADMINISTRATOR'S ACTION THEREFORE CANNOT SET ASIDE HIS APPROVAL ON THOSE GROUNDS

As we discussed above, the petition under Section 307(b)(1) is for judicial review of the Administrator's action and if the Administrator cannot disapprove a state implementation plan on economic or technological infeasibility grounds, such claims are also not cognizable upon a petition for review in the court of appeals. Thus, the relevant inquiry is whether the Administrator must disapprove a state implementation plan that is economically or technologically infeasible for certain emission sources.

The Administrator's power to approve or disapprove a state implementation plan is explicitly circumscribed by the Act. Section 110(a)(2) requires the Administrator to approve a state implementation plan that conforms to eight specified requirements. See Section 110(a)(2)(A)–(H), 42 U.S.C. 1857c-5(a)(2)(A)–(H); *Train* v. *Natural Resources Defense Council, Inc.* (*"NRDC"*), 421 U.S. 60, 79. If the state implementation plan contains emission limitations that are necessary for the attainment of national primary ambient air quality standards not later than three years from the date of approval, the Administrator cannot reject it because these emission limitations may be infeasible for some emission sources.

This much is apparent from Section 110(a)(2), which provides in relevant part:

> * * * The Administrator shall approve [a state implementation plan] * * * if he determines * * * that—
>
> (A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary

[10] Recent amendments to the Act, the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246, are designed to take into account some of the factors that, in petitioner's view, constitute "significant new information" justifying late review under Section 307(b)(1). In these new amendments, Congress recognized the need for some degree of accommodation between the goals of the Clean Air Act and the problems created by the energy shortage. Congress therefore amended Section 110 by adding Section 110(a)(3)(B), 88 Stat. 256, pursuant to which the Administrator must review state implementation plans to determine whether their restrictions for fuel-burning stationary sources may be relaxed without interfering with the timely attainment and maintenance of the national air quality standards. If the Administrator determines that such a relaxation could be made, he is to notify the State that it may submit a plan revision. Petitioner argues (Pet. Br. 28) that Congress lacks the "flexibility to deal with" the new information that is the basis of its petition for review. But in view of the Energy Supply and Environmental Coordination Act, petitioner's argument is merely a way of saying that it "[took its] case to Congress" (Pet. Br. 28), but failed to obtain all of the relief it desired. See note 25, *infra*.

> standard as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan * * *; [and]
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary * * * standard * * *;
>
> * * * * *

This language requires the Administrator to ascertain whether the State's plan contains the necessary emission limitations, that is, specific rules to which sources of pollution are subject and which, if enforced, would insure the timely attainment of national primary ambient air quality standards. The language does not require the Administrator to ascertain whether compliance with these necessary emission limitations is feasible. On the contrary, the mandatory wording of the statute indicates that feasibility considerations are irrelevant under Section 110(a)(2) particularly when the result of taking them into account would be nonattainment of the air quality standard. See, *e.g., Indiana & Michigan Electric Co.* v. *Environmental Protection Agency,* 509 F. 2d 839, 844 (C.A. 7); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 507 F. 2d 905, 914 (C.A. 9); *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F. 2d 646, 675 (C.A. 1).

That the Administrator is not required to ascertain whether compliance with necessary limitations is feasible becomes even more certain when Section

110(a)(2) is compared with Sections 110(e) and 110(f), 42 U.S.C. 1857c-5(e) and 1857c-5(f). Section 110(e) permits the Administrator to allow a two-year extension of the three-year deadline provided for in Section 110(a)(2)(A)(i) if he finds that compliance with the requirements of the state implementation plan is not technologically feasible. But the Administrator is to consider the extension only if it is requested by the Governor of the State at the time the implementation plan is submitted, and the Administrator may grant the extension only if the State has provided reasonable interim controls. Section 110(f) permits the Administrator, upon application from the Governor of the State, to allow a one-year postponement of any compliance date in an implementation plan if the Administrator finds that compliance is infeasible and that "the continued operation of [the emission source] is essential to national security or to the public health or welfare * * *." This Court has construed Section 110(f) as "a safety valve by which may be accorded, under certain carefully specified circumstances, exceptions to the national standards themselves." *Train* v. *NRDC, supra,* 421 U.S. at 81; see *id.* at 81–87.

Beyond the carefully limited circumstances of Sections 110(e) and 110(f), however, the Administrator may not permit timely attainment of national standards to be compromised on the basis of claims that compliance with necessary emission limitations is in-

feasible.[11] See *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 507 F. 2d at 914; Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources,* 89 Harv. L. Rev. 316, 321, 332, and n. 86, 338 (1975).[12]

The meaning we have derived from the Act's language and structure is amply supported by the Act's legislative history. The Clean Air Amendments of 1970 represent a new approach. See *Train* v. *NRDC, supra,* 421 U.S. at 63–67.[13] Early efforts in the

[11] In other sections of the Act, dealing with different concerns, Congress specifically made economic and technological factors relevant. For example, a standard of performance for new stationary sources is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." Section 111(a)(1), 42 U.S.C. 1857c–6(a)(1). See Section 111(a)(2), 42 U.S.C. 1857c–6(a)(2). In light of this specific mention of economic and technological factors, the omission of these factors from Section 110(a)(2) cannot be viewed as mere oversight, but instead represents a deliberate legislative judgment that such factors are simply not relevant at the plan-approval stage. See also Sections 202 (42 U.S.C. 1857f–1), 211(c)(2)(A) (42 U.S.C. 1857f–6c(c)(2)(A), 231 (42 U.S.C. 1857f–9).

[12] From 1972 to 1975, the author of the above cited article, Professor Samuel A. Bleicher, served as a Deputy Director for Regulation and Enforcement in the Ohio Environmental Protection Agency.

[13] For a detailed synopsis of Congress' earlier attempts to control air pollution, and of the legislative history of the 1970 amendments, see Bonine, *The Evolution of 'Technology-Forcing' in the Clean Air Act,* Environmental Reporter, Monograph No. 21 (July 25, 1975). Mr. Bonine is a deputy associate general counsel of the Environmental Protection Agency, although the piece was written by Mr. Bonine in his private capacity.

field of air pollution control focused on federal funding of research and development designed to advance control technology. See the Air Pollution Act of 1955, Pub. L. 74–159, 69 Stat. 322; the Clean Air Act of 1963, Pub. L. 88–206, 77 Stat. 392. When sources of pollution failed to use the new technology, federal legislation was adopted to require that they do so. See the Motor Vehicle Air Pollution Control Act of 1965, Pub. L. 89–272, 79 Stat. 992; the Air Quality Act of 1967, Pub. L. 90–148, 81 Stat. 485. The requirements were tied to available technology and the impetus for technological development was still public funding of research and development.

The rate of progress in the nationwide effort to control air pollution proved unsatisfactory, and in 1970 both houses of Congress passed amendments to the Clean Air Act. See S. 4358, 91st Cong., 2d Sess. (1970) ("Senate Bill") (reprinted at 1 Legislative History of the Clean Air Amendments of 1970, Senate Committee on Public Works, 93d Cong., 2d Sess. 357–358, 392–393, 531 (1974) ("Leg. Hist.")); H.R. 17255, 91st Cong., 2d Sess. (1970) ("House Bill") (reprinted at 2 Leg. Hist. 910). There were substantial differences in the two bills; in conference, the more stringent Senate version largely prevailed. See H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970) (reprinted at 1 Leg. Hist. 151); 1 Leg. Hist. 111 (House consideration of the conference committee report), 123 (Senate consideration of the conference committee report). The conference's product was adopted by both houses, and signed into law December 31, 1970, Pub. L. 91–604, 84 Stat. 1676.

599–797—75——4

The Act represents two significant departures from previous efforts. First, air quality standards were to be set solely with regard to the public health and welfare rather than in light of available technology.[14] Second, primary standards were to be met, not in a reasonable time, as the House Bill had provided,[15] but "as expeditiously as practicable but * * * in no case later than three years * * *," Section 110(a)(2)(A), 42 U.S.C. 1857c–5(a)(2)(A), as the Senate Bill had required. See *Train* v. *NRDC, supra,* 421 U.S. at 66–67. The "technology-forcing" approach inherent in these two elements of the Act is explicitly recognized in the Senate Report (S. Rep. No. 1196, 91st Cong., 2d Sess. 2–3 (1970) (reprinted at 1 Leg. Hist. 401, 402–403)):

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.

[14] Compare Sections 107 and 108 of the Air Quality Act of 1967, Pub. L. 90–148, 81 Stat. 485, 490, 491, with Sections 108(b)(1) and 110 of the Clean Air Act as amended in 1970, 42 U.S.C. 1857c–3(b)(1) and 1857c–5.

[15] Compare also Section 108(c)(1) of the Air Quality Act of 1967, Pub. L. 90–148, 81 Stat. 492.

> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.[16]

[16] Senator Muskie, the manager of the Senate Bill, stated during the floor debates (116 Cong. Rec. 32901–32902 (1970)):

"The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time.

* * * * *

"Mr. President, I should like to make the philosophy of the bill clear, with this emphasis:

"Predictions of technological impossibility or infeasibility are not sufficient as reasons to avoid tough standards and deadlines, and thus to compromise the public health."

Senator Cooper likewise noted that Congress was intentionally placing demands on industry (*id.* at 32919):

"Mr. President, in presenting this general outline of the plan of attack on air pollution provided by the bill, it might as well be said that the philosophy of the bill abandons the old assumption of requiring the use of only whatever technology is already proven and at hand and of permitting pollution to continue when it is not economically feasible to control it. The bill proceeds instead to set out what is to be achieved, and places its reliance on a great effort to develop technology, to train and put to work the manpower to accomplish that purpose, and it assumes a readiness by industry and the people or the country to pay the costs of pollution control."

And Senator Prouty, summing up both Title I (dealing with stationary sources) and Title II (dealing with moving sources, primarily automobiles), stated (*id.* at 33115):

"An innovative feature of the bill, in keeping with the urgency of the problem, is the establishment of definite deadlines. State

In describing the work of the Conference Committee, Senator Eagleton later pointed out (Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., pt. 1, p. 21 (1972)):

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> "Giving due consideration to economic and technological feasibility of compliance."
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Thus, the language, structure, and history of the Clean Air Amendments of 1970 demonstrate that state implementation plans containing limitations necessary for the attainment of national primary ambient air quality standards not later than three years from the date of approval must be approved by

implementation plans must be designed to assure attainment of national ambient air quality standards within 3 years of acceptance. The auto manufacturers are required to reduce pollutant emissions by 90 percent on their 1975 models. In each case the basic tenet of the new bill is explicit; for the first time, air quality standards will take precedence over objections of economic impracticality and technical impossibilities."

the Administrator despite claims that compliance with such limitations is infeasible. In addition to the court below, other courts of appeals have adopted this conclusion.[17] As the Ninth Circuit stated in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 507 F. 2d at 914, the Act

> clearly evince[s] * * * [an] intent to realize national ambient air standards despite economic cost and in spite of the possibility that some business enterprises, unable to comply with a state's plan so as to enable that state to attain national standards within the prescribed time period, might have to terminate operations.

See also *Indiana & Michigan Electric Co.* v. *Environmental Protection Agency, supra,* 509 F. 2d at 844 ("a plan's technological feasibility and economic impact are not among the factors which the Administrator is obliged to consider under Section 110(a)(2), and that where a state's implementation plan satisfies the criteria set forth therein, the statute quite specifically requires the Administrator to approve it"); *South Terminal Corp.* v. *Environmental Protection Agency, supra,* 504 F. 2d at 675.[18]

[17] But see *St. Joe Minerals Corp.* v. *Environmental Protection Agency,* 508 F. 2d 743 (C.A. 3), petition for a writ of certiorari filed June 28, 1975 (No. 74–1650); *Appalachian Power Co.* v. *Environmental Protection Agency,* 477 F. 2d 495 (C.A. 4).

[18] There the First Circuit stated:

"The material portions of the Clear Air Act itself do not mention economic or social impact, and it seems plain that Congress intended the Administrator to enforce compliance with air qual-

This Court's opinion in *Train* v. *NRDC, supra,* suggests agreement with the conclusion that the Administrator must approve a state implementation plan even if not every source of emission will find it economically or technologically feasible to comply. The Court there stated (421 U.S. at 71, n. 11): "§110(a)(2) quite clearly mandates approval of any plan which satisfies its minimum conditions." Feasibility is not one of the conditions.[19]

In this case, however, it is argued that when the state implementation plan does more than meet minimum conditions—when, as was alleged here,[20] the

ity standards even if the costs were great. Particularly in the case of primary standards—those set as 'requisite to public health'—Congress' position is not extreme or unprecedented. Minimum public health requirements are often, perhaps usually, set without consideration of other economic impact. Thus, insofar as petitioners claim that either EPA or ourselves would be empowered to reject measures necessary to ensure compliance with primary air quality standards simply because after weighing the advantages of safe air against the economic detriment, we thought the latter consideration took priority, petitioners would be incorrect. Congress has already made a judgment the other way, and EPA and the courts are bound."

[19] The case dealt with EPA's authority to approve a State's "revision" of a plan previously approved, but since EPA's authority to approve revisions is subject to the same limitations as its authority to approve plans in the first instance (Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3)), the Court's analysis is pertinent to the question in this case.

[20] The petition for judicial review alleges "that compliance with [the emission limitations applicable to petitioner's power plants] is not necessary for the fulfillment of the national primary ambient air quality standards * * *" (A. 8).

state plan will achieve a higher quality of ambient air than required by national standards—the EPA Administrator must consider claims of economic or technological infeasibility in determining whether to approve the plan even if, as we have argued above, he is precluded from doing so in regard to plans that go no further than the minimum (Br. *Amici Curiae for* Appalachian Power Co., *et al.,* pp. 13–38).[21] The argument appears to be that since Section 110(a)(2)(B) requires state plans to contain such emission limitations "as may be necessary" to achieve national standards, the Administrator must disapprove state plans that would result in exceeding those standards (*id.* at 21–23, 37–38).

In the first place, even if the Administrator could disapprove a state plan on such grounds, it is difficult to understand what this has to do with the issue here—whether economic or technological infeasibility can serve as a ground for the Administrator's reject-

[21] Two of the cases said to support this conclusion, *South Terminal Corp.* v. *Environmental Protection Agency, supra,* 504 F. 2d at 676, and *District of Columbia* v. *Train,* 521 F. 2d 971, 997 (C.A. D.C.), consider EPA's obligation under Section 110(c), 42 U.S.C. 1857c-5(c), when it promulgates an implementation plan after a State has failed to do so. This is an entirely different situation than is presented by this case, where the Administrator did not promulgate a plan but simply approved one that had been promulgated by the State. As we discuss below, when a State promulgates a plan, it has the power under Section 116, 42 U.S.C. 1857d-1, to be "more stringent" than required by the Act. Section 116 is not available to the Administrator when he promulgates an implementation plan.

ing a state plan. An examination into the feasibility of the state plan scarcely helps to determine whether the emission limitations it contains will achieve a certain quality of ambient air. If the Administrator must examine plans to determine whether they are more stringent than required by the national standards, his task will not be aided by an inquiry into economic or technological factors. Under such a scheme the Administrator's approval would not depend on whether the plan is technologically or economically feasible. Presumably, the Administrator could not approve a plan designed to better the national standards even if it were feasible for emission sources to comply.

In any event, the fact that a state implementation plan will achieve a higher standard cannot serve as a basis for the Administrator's disapproval of the plan. Under Section 116, 42 U.S.C. 1857d–1, States retain the power to adopt and to enforce standards and emission limitations designed to achieve a higher quality of ambient air than is required by national standards. And the States have the responsibility for developing specific limitations to which sources of pollution are subject and which will insure attainment of the national ambient air standards set by EPA. See Section 107(a), 42 U.S.C. 1857c–2(a); *Train* v. *NRDC, supra,* 421 U.S. at 79. When they exercise this responsibility, the Administrator's duty is to make certain they have done enough, not to reject their efforts because they have done more than the minimum required of them. That would be inconsistent not only

with Congress' recognition of the States' role in controlling air pollution, but also with Section 110(a)(2)(B), which directs the Administrator to approve a state plan if it contains what is "necessary" to attain and maintain the national standards. See *Indiana & Michigan Electric Co.* v. *Environmental Protection Agency, supra,* 509 F. 2d at 843–844, nn. 1 and 2.[22]

What we have just said becomes even more certain in light of Section 110(a)(3)(A) (as amended by Pub. L. 93–319, 88 Stat. 256),[23] which directs the Administrator to approve variances from a State's emission limitations when the variance meets the same requirements (Section 110(a)(2)(A)–(H)) applicable to the initial approval of plans. See *Train* v. *NRDC, supra.* Two of those requirements, as we pointed out (pp. 15–16, *supra*), are that the plan provide for the attainment of national ambient air quality standards and contain the emission limitations that will do so. Section 110(a)(3)(A) thus antici-

[22] To read the term "necessary" as setting not only the minimum for state plans but also the maximum, as *amici* proposes (Br. 37–38), means that a State would have to adopt two sets of regulations to effectuate its power to establish and enforce stricter standards—one set of regulations to attain national standards but no more (under Section 110(a)), and another to attain the State's own desired standards (under Section 116). The impracticality of such a result belies any suggestion that Congress intended to require the Administrator to disapprove a plan promulgated under Section 110(a) which also serves the State's interest under Section 116 of achieving higher than minimum standards. See Bleicher, p. 18, *supra*, at 321, 351.

[23] The amendments merely added "(A)" to the provision, which is otherwise the same as when it was construed in *Train* v. *NRDC*, *supra.*

pates either that a State may want to upgrade the limitations in a plan already designed to attain the national standards, in order to achieve a higher standard, or that States may want to downgrade limitations in a plan that is presently more stringent than necessary to attain the national standards.[24] Neither situation could arise unless state implementation plans may contain more stringent limitations than necessary to attain national standards.[25]

The decision whether to include such limitations is thus left to the States, and "the Agency [has] no authority to question the wisdom of a State's choices * * *." *Train* v. *NRDC, supra,* 421 U.S. at 79. Congress fully expected that, before finalizing approvable plans, States would consider issues such as economic and technological feasibility, and would make the significant policy decisions then, before the plan reached EPA for federal review and approval.[26] But the Administrator cannot disapprove a state plan if it is more stringent than required and he likewise cannot reject a plan because some source or sources may find compliance infeasible.[27] In this case, petitioner's objections that it cannot comply with the state plan is a challenge to the wisdom of the State's choice and the appropriate place to resolve such matters is not in the federal court of appeals but in the responsible state agency. That indeed is the course petitioner is pursuing by seeking variances from the limitations affecting its three plants (A. 5). See p. 5, *supra.*

[24] Revisions may also be used to rearrange the mix of limitations in order to attain the national standards with a different allocation of burdens. See note 27, *infra.*

[25] The Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, 88 Stat. 246, amended the Clean Air Act in response to the fuel shortages in late 1973 and early 1974. As we explained in note 10, *supra*, the pertinent provision of that Act requires the Administrator to review state implementation plans to determine whether their restrictions for fuel-burning stationary sources may be relaxed without interfering with the timely attainment and maintenance of national air quality standards. If the Administrator determines that such a relaxation could be made, he is to notify the State that it may but need not submit a plan revision. Any such revision must be approved by the Administrator if it satisfies the requirements of Section 110(a)(2) applicable to initial plan approvals. This provision reflects congressional awareness that implementation plans may contain limitations that are more stringent than necessary to attain national standards. More important, it is indicative of congressional approval of this fact, since the provision requires the Administrator to notify the State merely that it may make the limitations less stringent, but does not authorize the Administrator to compel such changes.

[26] See 116 Cong. Rec. 42382 (1970) (remarks of Senator Muskie); *id.* at 16107 (remarks of Senator Cooper). EPA's regulations on the promulgation of implementation plans explicitly provide that a State may consider economics in determining how plan requirements are to be apportioned among subject sources, provided such allocation is sufficient to achieve ambient air standards within the deadlines established by Section 110(a)(2)(A) of the Act. See 40 C.F.R. 51.2(b) and (d).

[27] Pointing to the requirements that primary standards be achieved "as expeditiously as practicable but * * * in no case later than three years * * *," and that secondary standards be achieved in "a reasonable time * * *," Section 110(a)(2)(A), 42 U.S.C. 1857c–5(a)(2)(A), the *amici* utility companies argue that when, for example, an implementation plan seeks to achieve primary standards in less than three years, an emission source ought to be able to argue to the Administrator that this expeditiousness is not "practicable," and that the measure of a plan's practicability is its feasibility (Br. 13–16).

The question of the Administrator's obligation under the phrases "as expeditiously as practicable" and "a reasonable time" is not before the Court; petitioner here has made no claim of "temporal stringency" with respect to either primary or secondary standards.

In any event, under Section 116 of the Act, States may require

To hold otherwise would be to subject EPA to an impossible administrative burden, a result Congress could not have intended. States were required to attain air quality of specified standards in most cases within approximately four and one-half years from

the early attainment of national standards, just as they may require the attainment of stricter standards. In the case of primary standards, the phrase "as expeditiously as practicable" requires only that the Administrator determine whether a more expeditious attainment date than is provided in the State's plan is practicable. It does not require the Administrator to judge whether the date actually chosen by the State is impracticable. As with requests for relief from implementation plans that seek to attain higher standards of quality than required by the federal standards, the appropriate forum for relief from early attainment dates is the State, where the State's policy decisions can be fully reconsidered.

Also, the Administrator may not question a State's choice among alternative combinations of emission limitations designed to achieve national standards. Generally, each State develops an implementation plan by determining the amount of emissions which may be allowed in a region consistent with the attainment and maintenance of the standards, and then by allocating this amount among the sources. See 40 C.F.R. 51.13; Bleicher, p. 18, *supra*, at 325, 327–329. When a region has several sources of an emission, this "load allocation" decision presents a State with a number of alternatives. It is argued (*Amici* Br. 17–18, citing *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F. 2d 495, 506 (C.A. 4)) that the Administrator is to consider claims of infeasibility to determine whether one or another of the alternatives to the plan will work. Aside from the point, that, theoretically, an "infeasible" plan *will* work because it could require the pollution source to shut down, *amici*'s argument is foreclosed by *Train* v. *NRDC*, *supra*, 421 U.S. at 79, in which the Court said:

"[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

the passage of the Act,[28] with approximately a year and a half for promulgation of national standards and promulgation and approval of state implementation plans, and three years (or more expeditiously, if practicable) after plan approval for attainment of the primary standards.[29] Although the timetable called for all States to submit their implementation plans to EPA at approximately the same time—nine months after EPA had promulgated national ambient air quality standards—EPA was given but four months in which to analyze and pass upon these plans. Section 110(a)(1) and (2), 42 U.S.C. 1857c-5(a)(1) and (2).

Yet throughout the country there are hundreds of thousands of stationary emission sources that are subject to regulation under the Clean Air Act. Presumably, if petitioner's contention were accepted, EPA would have to evaluate, for each source in each State, whether it would be unable, due to economic or technological infeasibility, to comply with the restrictions.[30] Such a task would present an insur-

[28] But see Sections 110(e) and 110(f), 42 U.S.C. 1857c-5(e) and 1857c-5(f), which provide for limited exceptions to this schedule.

[29] See *Train* v. *NRDC*, *supra*, 421 U.S. at 65–67, 68 ("No one can doubt that Congress imposed upon the Agency and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time.").

[30] Such review, if required at all, would probably have to be source specific because economic and technological factors vary from source to source and plan approvals based on broad-based studies would be subject to challenges under Section 307(b)(1) on the ground that the source's particular problems were not contemplated by the study. See *Duquesne Light Company* v. *Environmental Protection Agency*, 522 F. 2d 1186 (C.A. 3), petition for a writ of certiorari filed November 19, 1975 (No. 75-736) (illustrating the detailed study of feasibility factors that might be demanded by a court of appeals).

mountable obstacle to EPA's timely approval of state plans.[31]

In light of the language, history and underlying policies of the Clean Air Act, we submit that EPA's interpretation of the Act—as not authorizing it to disapprove a state implementation plan on grounds that it may be infeasible for some pollution sources to comply—not only is sufficiently reasonable to be upheld by the courts, but also is correct. As in *Train* v. *NRDC, supra,* 421 U.S. at 87, EPA's interpretation of the Act is entitled to great weight, for EPA is "charged with administration of the Act." The "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it wrong,"[32] and here there are no such indications.

[31] While EPA has already approved the initial round of state implementation plans, a requirement that the Administrator consider economic and technological feasibility factors might well generate a raft of petitions for review of previously approved plans under Section 307(b)(1)'s savings provision. Furthermore, EPA anticipates additional rounds of plan approvals. Air quality data now being analyzed demonstrate that some urban areas are not attaining national primary standards despite the fact that limitations currently in force are generally being met. The States will have to respond with revised plans containing stricter limitations, and these revisions will be subject to the same challenges as the initial plan. See Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3). Finally, EPA expects that it will in due course adopt national standards for additional pollutants, or revised standards for pollutants that are already subject to regulation, and this would occasion another round of plan approvals.

[32] *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381, quoted with approval in *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421. See also *Udall* v. *Tallman*, 380 U.S. 1, 16–18.

C. THE COURT SHOULD NOT DECIDE IN THIS CASE WHETHER, AS PETITIONER CONTENDS, DUE PROCESS REQUIRES THAT THERE BE SOME OPPORTUNITY IN SOME JUDICIAL PROCEEDING FOR INFEASIBILITY CLAIMS TO BE CONSIDERED

Petitioner contends that if it cannot raise claims of infeasibility in a petition for review under Section 307(b)(1), this would be a violation of the Due Process Clause of the Fifth Amendment. This contention, which petitioner did not make in its brief to the court of appeals, was raised in the petition for a writ of certiorari as the third question presented (Pet. 2). The Court, however, granted the petition only as to the first question presented (Pet. Br. 3).

The due process issue is not properly before the Court. As we noted in the memorandum filed in response to the petition for a writ of certiorari in this case (pp. 8–9), petitioner's contention is premature. Petitioner asserts that "a constitutional interpretation of the Clean Air Act Amendments requires *at some time* judicial consideration (and a hearing) of the technological and economic factors * * *" (Pet. Br. 30–31; emphasis in original). But even if accurate this does not lead to the conclusion that the "judicial consideration" must come in a federal appellate court reviewing the Administrator's approval of a state plan.

There are other occasions when infeasibility claims might be presented to a court. For example, since a state implementation plan represents legislative and administrative decisions made by a State "after reasonable notice and public hearings" (Section 110(a)(1)), judicial consideration of such decisions may be

available in state court.[33] Moreover, petitioner concedes that under its view of what due process requires, there would be no constitutional question if claims of

[33] The State of Missouri's implementation plan calls for immediate compliance with its emission limitations, and provides a means by which individual sources unable to come into immediate compliance can obtain a variance. Section 203.110, Revised Statutes of Missouri (1972), provides in part:

> "1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission, or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.
>
> "2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by air contaminants emitted by the applicant."

As the Intervenor-Respondents explain in their brief (Br. 36–37): "By presenting its feasibility arguments to the state administrative agency, a particular source receives its required hearing on such issues. The right to an administrative hearing implies the right to review in the state courts." See *Indiana & Michigan Electric Co.* v. *Environmental Protection Agency*, *supra*, 509 F. 2d at 847.

infeasibility could be presented at the time of state or federal enforcement proceedings (Pet. Br. 31).[34]

Thus, it is not appropriate to reach petitioner's due process claim since this would require the Court first to decide that economic or technological feasibility could not be considered in any other type of proceeding, state or federal (see notes 33 and 34, *supra*). The court below did not hold that such factors could never be subjected to judicial scrutiny in a federal or state enforcement proceeding or otherwise. That question was not before the court of appeals, as it is not before this Court.

[34] Federal enforcement proceedings are governed by Section 113, 42 U.S.C. 1857c–8. Section 113(a)(1) provides:

"Whenever * * * the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, * * * the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b)."

If the Administrator chooses to issue an order rather than to proceed directly with a civil action, Section 113(a)(4) provides that such order will not take effect "until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation." Further, the order must "specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." If the Administrator chooses not to issue an order, or if the Administrator issues an order that is subsequently violated, Section 113(b) permits him to proceed with a civil action in an appropriate United States district court. The Administrator may seek "appropriate relief" from the court, including an injunc-

Moreover, under petitioner's argument, that due process requires a court to be available at some time to consider infeasibility claims, a holding here that such claims may not be presented in Section 307(b)(1) petitions would mean simply that they could be presented at one of the other times mentioned above. For the reasons stated in Parts A and B, *supra,* infeasibility claims are not cognizable in a petition to a federal court of appeals to review the Administrator's approval of an implementation plan. The merits of petitioner's due process claim in the context of other judicial proceedings is an issue that cannot appropriately be decided here.

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tion. In some cases (see Section 113(c)(1)) he may seek monetary fines and a term of imprisonment.

It is the position of the Administrator that claims of economic or technological infeasibility are relevant to his fashioning of an appropriate enforcement order under Section 113(a)(4), that is, to his determination of a time for compliance with the plan's requirements which is "reasonable." Presumably, a court, too, in exercising its equitable power to fashion the "appropriate relief" could consider economic and technological factors. Thus, if due process "would call for the presentation of technological and economic factors" in some judicial context (Pet. Br. 31), such a requirement would be satisfied.

It is the Administrator's view, however, that claims of infeasibility are not relevant to whether there has been a violation of the implementation plan. Such claims, in other words, may not be used to render invalid the emission limitations in the implementation plan or as a means of revising or compromising the plan's requirements. Section 113 by its own terms contemplates the fashioning of an enforcement order, by the Administrator or by a court, only after it is determined that a violation has occurred, and only then are infeasibility claims relevant.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1975

UNION ELECTRIC COMPANY,
Petitioner,
vs.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent,
and
JOHN C. DANFORTH,
Attorney General of Missouri and the
MISSOURI AIR CONSERVATION COMMISSION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR INTERVENOR—RESPONDENTS

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TABLE OF CONTENTS

Page

Opinion below 1

Summary of argument 2

Argument 5

I. The Courts of Appeals do not have jurisdiction in an action under Section 307(b)(1) of the Clean Air Act to address questions concerning the economic and technological feasibility of a state implementation plan. 5

A. Jurisdiction under Section 307(b)(1) is limited to the questions which the Administrator could consider under Section 110(a). 6

B. The Administrator, in approving state implementation plans, is limited to a consideration of those factors listed in Section 110(a)(2). 8

1. Section 110(a)(2) does not mention technological or economic feasibility, and other sections of the Clean Air Act show that such exclusion was intentional. 9

2. The states may develop and submit implemention plans more stringent than required by Section 110(a)(2)(A). 14

3. Congress intended that individual sources of pollutants would seek relief from the state, were compliance with an implementation plan was alleged to be infeasible. 18

C. The decisions of the Courts of Appeals which support the petitioner's arguments were decided incorrectly. 24

II. The petitioner will not be denied due process of law

if it cannot raise issues of technological and economic feasibility in Section 307(b) proceedings, as it has available to it other remedies and other forums for review. 33

A. Section 307(b) does not preclude review of questions of economic and technological feasibility at the enforcement stage. 34

B. Petitioner can also apply for relief, and obtain a full and fair hearing, in state administrative and judicial tribunals, as well as presenting its feasibility arguments in a Section 113 conference with the Administrator. 35

III. A holding that a petitioner cannot obtain a review of questions of economic and technological feasibility in Section 307(b) proceedings will best serve the state/federal relationship embodied in the Clean Air Act, and will avoid the procedural and practical difficulties of injecting technical factual issues into the appellate level in the first instance. 38

Conclusion 42

TABLE OF AUTHORITIES

CASES:

Appalacian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973) 28, 35

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) 33

Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973) 9, 31

District of Columbia v. Train, 521 F.2d 971 (D.C.Cir. 1975) 31

Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973) 26, 38

Duquesne Light Co. v. EPA, 8 E.R.C. 1065 (3d Cir. 1975) 28, 40

Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972) 25, 35, 37, 40

Indiana & Michigan Electric Co. v. EPA, 509 F.2d 839 (7th Cir. 1975) 10, 19, 32, 33, 35, 36, 37, 38

International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) 13

Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. 1974) 9

Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390 (5th Cir. 1974) 9, 18

Nickey v. Mississippi, 292 U.S. 393, 54 S.Ct. 743, 78 L.Ed. 1323 (1934) 37, 38

Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) 12

Reichold Chemicals v. EPA, 8 E.R.C. 1207 (7th Cir. 1975) 35

Rowan v. United States Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970) 37, 38

St. Joe Minerals Corp. v. EPA, 508 F.2d 743 (3d Cir. 1975) 26, 28, 29
Sierra Club v. Ruckelshaus, 344 F.Supp. 253, aff'd, sub. nom. Fri v. Sierra Club, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973) 17
South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) 31, 40
Texas v. EPA, 499 F.2d 289 (5th Cir. 1974) 40
Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975) ..7, 11, 14 18, 21, 30, 36, 38
Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir. 1975) 5, 6, 40

STATUTES:

Clean Air Act, As Amended

Section 105—42 U.S.C. §1857c 16
107—42 U.S.C. §1857c-2 25
107(a)—42 U.S.C. §1857c-2(a) 18
109—42 U.S.C. §1857c-4 ..... 9, 32, 40
110—42 U.S.C. §1857c-5 ..... 5, 9, 13, 14, 16 17, 18, 21, 23, 25, 27, 28, 30, 32, 33, 34, 40
110(a)(1)—42 U.S.C. §1857c-5(a)(1) 9, 12, 32
110(a)(2)—42 U.S.C. §1857c-5(a)(2) ... 6, 8, 9, 10, 12, 14, 15, 16, 17, 21, 22, 27, 29, 30, 31, 34, 39, 42
110(a)(2)(A)—42 U.S.C. §1857c-5(a)(2)(A) ... 7, 14, 15, 17, 18, 21, 23, 27, 36
110(a)(2)(B)—42 U.S.C. §1857c-5(a)(2)(B) .. 8
110(a)(2)(C)-(H)—42 U.S.C. §1857c-5(a)(2)(C)-(H) 8, 23
110(a)(3)—42 U.S.C. §1857c-5(a)(3) 21, 36
110(a)(3)(B)—42 U.S.C. §1857c-5(a)(3)(B) .. 16
111(a)(1)—42 U.S.C. §1857c-6(a)(1) 12
113—42 U.S.C. §1857c-8 ..... 34, 35
113(a)(4)—42 U.S.C. §1857c-(a)(4) 35
116—42 U.S.C. §1857d-1 .. 16, 17, 18, 23, 25, 27, 36
202(a)(2)—42 U.S.C. §1857f-1(a)(2) 12
211(c)(2)(A)—42 U.S.C. §1857f-6c(c)(2)(A) . 13
231(a)(1)(B)—42 U.S.C. §1857f-9(a)(1)(B) .. 13
231(b)—42 U.S.C. §1857f-9(b) 13
307(b)—42 U.S.C. §1857h-5(b) 5, 20, 22, 23, 31 33, 34, 35, 38, 39, 40, 41
307(b)(1)—42 U.S.C. §1857h-5(b)(1) .. 5, 6, 23, 24, 25, 26, 28, 29, 30, 31, 35, 37
307(b)(2)—42 U.S.C. §1857h-5(b)(2) 26, 29, 30, 34, 35

Missouri Air Conservation Law

Section 203.110, RSMo 1969 (V.A.M.S.) 19, 36

REGULATIONS:

37 Fed.Reg. 10875 (1972) 5
40 C.F.R. §51.2 (1974) 15
40 C.F.R. §52.1332 (1974) 19

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR INTERVENOR—RESPONDENTS

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 515 F.2d 206. It is printed at Pages A-1 through A-26 of Appendix A to the Petition for Certiorari in this case.

SUMMARY OF ARGUMENT

The issue before this Court is whether the Courts of Appeals have jurisdiction to consider the economic or technological feasibility of emission regulations in a state implementation plan. The position of the State of Missouri is that the jurisdiction of the Courts of Appeals is expressly limited to a review of the factors the Administrator is empowered and directed to consider in his determination whether to approve a state implementation plan; that the Clean Air Act is unambiguous in setting out the Administrator's powers; and that the Act does not include assessment of economic and technological factors as a part of the implementation plan approval process.

Furthermore, the state's position is that the relief that petitioner seeks is properly available through other procedures (namely state variances, or with EPA as a defense in enforcement proceedings). The underlying basis for the proceeding brought below is petitioner's desire to avoid enforcement of the state's sulfur dioxide emission regulations for the St. Louis area against three of its power plants. That is the very nature of a variance, variances being part of the enforcement strategy of the state.

Consequently, petitioner is really attempting to gain a permanent variance from the regulation, but through the method of disapproval of the emission limitation. This approach runs counter to the main goal of the Act, which is to attain and maintain national ambient air quality standards. Allowing a challenge by a specific source to an emission limitation on the basis of inability of the specific source to meet the limitation, with the possible result that a limitation which controls all sources of the pollutant will be disapproved, would certainly interfere with attaining and maintaining the national standards.

Thus, where national standards have not been attained or are not being maintained, a variance for a specific source must be disapproved. If follows that such source should not, by challenging the emission limitation itself, be allowed to in effect obtain a variance, not only for itself but for all other sources. But, in the case where national standards are being attained and maintained, there is no justification for a specific source attempting to obtain a variance by challenging the regulation on the basis of economic and technological feasibility, when the variance procedure is the ready and appropriate remedy.

Not only do pre-enforcement challenges to emission limitations on feasibility grounds run counter to the plain meaning of the provisions of the Act, they run counter to the philosophy of the Act as to state/federal relationships. As expressed by this Court in *Train,* the states are free to make the policy decisions as to how best to meet the central requirement of the Act, i.e., the national standards. This includes whatever mix of emission limitations the state chooses. The states are also free to set more stringent ambient air quality standards and emission limitations if they so desire.

These are proper policy decisions of the state, and it follows that the state may choose any lawful means it desires to acomplish its goals; included, of course, is the ability of the state to grant individual variances from its requirements if necessitated by economical and technological factors, and if desired by the state in the best interest of the citizens of the state. Congress did not intend to interfere with these state policy decisions, and in fact the Administrator must approve such policy decisions so long as national standards are being met.

Accordingly, the state/federal relationship is best served by the consideration of economic and technological

factors by the federal Administrator in the context of federal enforcement proceedings, not in a review of the state's public policy decisions (as expressed in the state implementation plans) during the approval process. The Administrator, therefore, should be, and has been by the clear language in the Act, limited to determining only if the state's policy decisions will do the job required by the Act, i.e., meet the federal standards.

ARGUMENT

I. The Courts of Appeals do not have jurisdiction in an action under Section 307(b)(1) of the Clean Air Act to address questions concerning the economic or technological feasibility of a state implementation plan.

Petitioner's basis for asserting jurisdiction in the court below is Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §1857(h)-5(b)(1). This statute, in relevant portion, states:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan under Section 110 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval or action, or after such day if such petition is based solely on grounds arising after such 30th day."

This section plainly vests jurisdiction in the Eighth Circuit Court of Appeals to review the action of the Administrator in approving the Missouri implementation plan.[1] The question before this Court is the bounds of that jurisdiction. Put another way, what is the scope of review by the Court of Appeals of the approval by the Administrator of Missouri's implementation plan?

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[1] That portion of the Missouri implementation plan which contains Regulation X(B) of the St. Louis Metropolitan Area Regulations was approved on May 31, 1972. 37 Fed.Reg. 10875 (1972). Thus the petition was filed more than thirty days after the Administrator's approval of the Missouri plan. We need not address in this proceeding whether the various grounds for review alleged by the petitioner arose more than thirty days after the Administrator's approval. The court below held that questions of economic and technological feasibility of an implementation plan can never be reviewed in a Section 307(b) proceeding. The court did not reach the question of timing of the petition. *Union Electric* v. *EPA*, 515 F.2d 206 (8th Cir. 1975), A-6 and A-7 of Pet. for Cert.

A. Jurisdiction under Section 307(b)(1) is limited to the questions which the Administrator could consider under Section 110(a).

The precise question before this Court is whether the Court of Appeals has jurisdiction, pursuant to Section 307(b)(1), to review the technological and economic feasibility of a state implementation plan, or portions thereof. We believe that the resolution of this question is dependent upon the scope of the determination which the Administrator must make in approving or disapproving a state-submitted implementation plan under Section 110(a)(2). Section 307(b)(1) provides for review of the "Administrator's action" in approving a state plan. The Court of Appeals, in reviewing the Administrator's action in approving the plan, would be determining whether the Administrator's decision was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." *Union Electric* v. *EPA, supra,* p. A-12 of Pet. for Cert., and cases cited therein.

It seems axiomatic that given the standard of review by the Court of Appeals, its inquiry is limited to a review of those factors which the Administrator had a legal obligation to assess. *Union Electric* v. *EPA, supra,* p. A-12 of Pet. for Cert. If the Administrator was bound to assess the economic and technological feasibility of a state plan, then it cannot be disputed that the Court of Appeals review may extend to such factors. Conversely, if the Administrator cannot assess such factors in his approval of the state plan, the Court of Appeals has no jurisdiction to review such factors. The essential issue, then, is the scope of the Administrator's inquiry regarding the state plan.

At the outset, it might be helpful to the court's understanding of this case, and to the orderly discussion of the issues, to explain what an implementation plan encompasses. The implementation plan is, basically, a means of assuring that national ambient air quality standards are achieved and maintained. The first step in the process of devising a plan is the cataloging of all sources, in an affected region, of a particular pollutant for which a national standard is set. The cataloging leads to a calculation of the total amount of each pollutant being emitted into the air in the affected region. The second step in the process is a determination (calculation) of the reduction in pollutant emissions which must be achieved in order to maintain national ambient air quality standards in that region.[2] This figure would be expressed in quantitative terms, and would represent the amount of emission reduction which all sources, in the aggregate, must achieve.

The third step is the setting of emission limitations, which will ensure that overall emissions will be reduced by the amount specified in Step 2. The specific emission limitations will, however, usually be expressed in terms of a quantitative limit on the amount of emissions allowed from a particular source, and not as a percentage reduction in emissions from that source. These specific emission limitations need not be uniform among all types of sources in a region. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975). The fourth step is to set deadlines for compliance by sources with the specific emission limitations. These deadlines will assure that national standards are met within the time limits set by Section 110(a)(2)(A), or sooner if the state so desires.

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[2] As discussed later, the State might choose to set its own, more stringent, ambient air quality standards. If so, then emission reductions will be calculated to achieve those more stringent standards. More stringent state air quality standards would not need to be submitted to the Administrator for approval.

The fifth step is the provision of adequate procedures and machinery to enforce the specific emission limitations. The enforcement machinery would include, at a minimum, those things spelled out in Section 110(a)(2)(C)-(H). As pointed out below, it may also include a procedure for granting relief from the provisions of an emission limitation or compliance deadline variances, if such relief does not threaten national ambient air quality standards, and if such relief would serve state interests.

The implementation plan, then, is arrived at via a five-step process. When submitted to the Administrator, it will contain, at a minimum, three components: (1) specific emission limitations; (2) compliance schedules or deadlines; and (3) enforcement and other machinery to ensure that the requirements of the Act and the plan are achieved. The plan might also contain other components, such as transportation and land-use controls. See Section 110(a)(2)(B).

State regulations are the legal vehicles by which implementation plans are promulgated. A particular regulation might impose a specific emission limitation on a source or class of sources. The same regulation might also specify the schedule or deadline for compliance. State regulations would also be required for those matters mentioned in Section 110(a)(2)(C)-(H), unless addressed by state statute.

B. The Administrator, in approving state implementation plans, is limited to a consideration of those factors listed in Section 110(a)(2).

In determining what factors the Administrator must assess when approving a state plan, we must look to the Clean Air Act, as the Administrator's action is provided for by that Act. This process, of necessity, involves statutory

construction. Some of the reported cases directly addressing this point have given much attention to the legislative history of the Clean Air Act Amendments of 1970, which provide the current regulatory framework. Petitioner's brief also devotes considerable attention to certain aspects of the legislative history of the 1970 Amendments.

However, we believe that resort to the various Committee Reports, debates, and the House and Senate Bills, is not only unnecessary, but also counter-productive. Resort to the legislative history of a statute is unwarranted when the terms of the statute are clear and unambiguous. *United States* v. *Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *Natural Resources Defense Council, Inc.* v. *EPA*, 507 F.2d 905 (9th Cir. 1974). As argued hereafter, we believe the terms of the Clean Air Act, as regards the issue at hand, to be clear and unambiguous. Moreover, we believe the legislative history itself to be ambiguous and self-contradictory. Reliance on such history, rather than leading to clarity, only results in confusion. See *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162 (6th Cir. 1973).

1. Section 110(a)(2) does not mention technological or economic feasibility, and other sections of the Clean Air Act show that such exclusion was intentional.

To determine the scope of the Administrator's inquiry into a state plan, one looks first to Section 110. Subsection (a)(1) provides that each state is to adopt and submit a plan which provides for the implementation, maintenance and enforcement of primary and secondary ambient air quality standards (promulgated by the Administrator pursuant to Section 109). Subsection (a)(1) establishes the time frame for submittal of such plans, and also provides that state adoption of plans shall take place after reasonable notice and public hearings.

After providing in Section 110(a)(1) for the adoption

and submission of plans by each state, the Act declares in Section 110(a)(2) that:

> "(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The *Administrator shall approve such plan,* or any portion thereof, *if he determines* that it was adopted after reasonable notice and hearing and *that*
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> (A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls . . . . [Emphasis added]."

Subparagraphs (C)-(H) set out requirements, not here relevant, dealing essentially with the mechanics of the state's program.

The emphasized words in Section 110(a)(2) are the key to the issue at hand. *Indiana and Michigan Electric Co.* v. *EPA,* 509 F.2d 839 (7th Cir. 1975). Section 110(a)(2) unambiguously declares that the Administrator *shall* approve a state plan if it was adopted after notice and hearing, and if it meets the requirements set forth in subparagraphs (A)-(H). We believe it abundantly clear that the provisions of Section 110(a)(2), and particularly subparagraphs (A)-(H), define the parameters of the Administrator's inquiry.[3] The breadth of the Administrator's discretion in approving state plans is thereby limited by Section 110(a)(2).

Subparagraphs (A) through (H) of Section 110(a)(2) are, although sowewhat general in terms, not at all ambiguous. They require that the state plan contain provisions for: (A) attainment of primary and secondary standards within certain periods; (B) emission limitations, schedules, timetables of compliance and other measures for attainment and maintenance; (C) monitoring, compilation, analysis and reporting of ambient air quality data; (D) procedures for pre-construction review of certain new sources; (E) intergovernmental cooperation; (F) assurances for funding and personnel, monitoring by sources, reports thereon and follow-up action by the state, public accessibility to data, and authority for emergency episodes; (G) periodic testing and inspection of motor vehicles, if necessary; and (H) revision of the plan upon the happening of certain conditions.

Nowhere in subparagraphs (A)-(H) is any mention made of the economic or technological feasibility of the plan, either expressly or implicitly. Section 110(a)(2) contains a rather long list of requirements which a state must meet before the Administrator's approval can be granted. It is illogical to assume that Congress would enact such

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[3] See *Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975). See, in particular, fn. 11. While the language in fn. 11 is dicta to that case, it is instructive that this Court reach the conclusion which we are now advocating.

a list of requirements, yet would intend that another factor, technological and economic feasibility, be an unspoken requirement for approval. Had Congress intended feasibility to be a prerequisite for approval, it would have said so in Section 110(a)(2). *Expressio unius est exclusio alterius.*

The lack of logic in assuming that Congress intended feasibility to be an unexpressed requirement of Section 110(a)(2) is shown by reference to other sections of the Act which do require that economics and technology be taken into account. Section 111 requires the promulgation by the Administrator of new source performance standards. Paragraph (a)(1) defines a standard of performance as:

> ". . . a standard for emissions of air pollutants which affect the degree of emission limitation achievable through the application of the best system of emission reduction which (*taking into account the cost* of achieving such reduction) the Administrator determines has been *adequately demonstrated.*"

Although not using the term "economic and technological feasibility", this paragraph quite clearly requires the Administrator to take these factors into account in setting standards of performance. *Portland Cement Ass'n.* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

Section 202 requires the Administrator to establish emissions standards for motor vehicles. Paragraph 2, Section 202(a), provides:

> "Any regulation prescribed under this section (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the *requisite technology, giving appropriate consideration to the cost of compliance in such period.*"

Like Section 111 regarding new source performance stand-

ards, Section 202 requires that the Administrator take economic and technological factors into account in setting vehicle emission standards. *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615 (D.C. Cir. 1973).

Similarly, Section 211(c)(2)(A), relating to control of fuels and fuel additives, provides that:

> "No fuel, class of fuel, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other *technologically or economically feasible means* of achieving emissions standards under Section 202."

And Section 231(b), respecting the development of aircraft emission standards, provides:

> "Any regulation prescribed under this section (and any revision thereof) shall take effect after such period as the Administrator finds necessary (after consultation with the Secretary of Transportation) to permit the development and application of the *requisite technology, giving appropriate consideration to the cost of compliance* within such period."

Section 231(a)(1)(B) also requires the Administrator, in studying the emissions of air pollutants from aircraft, to determine "the technological feasibility of controlling such emissions."

The Administrator is required in four separate sections of the Act, in unmistakable terms, to take economic and technological feasibility into account in setting substantive standards. Yet Congress did not so provide in Section 110, the second setting forth criteria for the Administrator's approval of state implementation plans. This fact is even more significant when one considers that the

state-promulgated implementation plans are the primary source of air pollution abatement under the Act. *Train* v. *Natural Resources Defense Council, Inc., supra.*

Had Congress intended that the Administrator, in approving the primary tool in the regulatory scheme of the Act, take economic and technological feasibility into consideration, it surely would have made the requirement more clear. It specifically so provided in four other sections of the Act, each dealing with an instance where the Administrator was to take the initial action in promulgating substantive standards. The failure of Congress to so provide in Section 110, where the states were to promulgate the substantive standards, could not have been some error of omission.

2. The states may develop and submit implementation plans more stringent than required by Section 110(a)(2)(A).

The above interpretation of Section 110 of the Act, and of the Administrator's responsibilities under the Act, is further supported by this Court's decision in *Train* v. *Natural Resources Defense Council, Inc., supra.* In that case this Court had before it the question whether the Act allowed room for variances to be granted to individual sources, beyond the mandatory attainment date set by Section 110(a)(2)(A). In arriving at the conclusion that the Act did not bar state-granted variances which would not interfere with the attainment and maintenance of national ambient air quality standards, this Court noted:

> "The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under §110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitation is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitation it deems best suited to its particular situation." 421 U.S. at 79 [Emphasis in original]

The above language is crucial to the resolution of the issues in the present case, for it sets forth Congress' delineation of responsibility between the states and the Administrator. EPA was to promulgate national ambient air quality standards for specific pollutants. Those standards were to be set at the levels of pollutants in the ambient air which the Administrator determined must be achieved to protect public health and welfare. Each state, however, was to determine how it wanted to achieve those standards, so long as national standards are attained within the periods specified by Section 110(a)(2)(A), and thereafter continue to be maintained.[4]

[4] In the process of determining that a mix of emission limitations which best suited its needs, each state would have the opportunity to consider the economic and technological feasibility of various alternatives. EPA encouraged, but did not require, the states to do so. 40 C.F.R. §51.2. As a practical matter, though, it would be necessary for a state to consider such factors, as well as others, in arriving at its desired mix of emission limitations and deadlines. The choice of who is to reduce emissions and by what amounts necessarily involves weighing of such factors.

Section 110 is a direction to the Administrator to approve a state plan if it provides, at the minimum, for attainment and maintenance of national ambient air quality standards, and it contains those specific means set out in subparagraphs (B)-(H) for enforcing the plan. But the states are not foreclosed by the promulgation of national ambient air quality standards from setting standards and limitations more stringent than required to meet the national standards. Section 116. Section 110 only establishes the minimum requirements that a state must meet to gain approval of its plan, and thereby qualify for a federal funding under Section 105.

Another indication of Congressional intent with regard to Section 110(a)(2), really an affirmation of that intent, is found in Section 110(a)(3)(B), the revision section. Subparagraph (B), added by the Energy Supply and Environmental Coordination Act of 1974, Public Law 93-319, reads:

"As soon as practicable, the Administrator shall . . . review each state's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources . . . without interfering with the attainment and maintenance of any national ambient air quality standards within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the state that a plan revision may be submitted by the state. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if . . . the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission."

This provision clearly contemplates that state plans, as approved, may in fact be more stringent than required to attain and maintain national standards. The Administrator is directed to determine if any plans can be revised (made less stringent) without interfering with attainment and maintenance, and is directed to quickly approve any such revision submitted by a state. However, no revision can be approved if it will cause the plan to violate the requirements of Section 110(a)(2). Had Congress not intended that implementation plans could be more stringent than required by Section 110(a)(2)(A), the 1974 Amendment would have been totally unnecessary.

The argument by *amici*, Appalacian Power Company, *et al.*, that the Administrator cannot approve an implementation plan if it is more stringent than required by Section 110(a)(2)(A), is further refuted by the decision in *Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253, aff'd., sub. nom. *Fri* v. *Sierra Club*, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973). If the implementation plan cannot allow degradation of air quality to secondary standards, then plans for regions where the air is cleaner than secondary standards must, of necessity, be more stringent than required to maintain national standards. The Administrator, in those instances, would be required to disapprove the plan unless it was more strict than required to meet national standards. It follows that he may approve more stringent plans in all cases.

Section 110 and 116 are not, as *amici* Appalacian Power Co., *et al.*, would have it, a delineation of the bounds beyond which a state plan may not go if it is to gain approval. Instead, Section 110 sets forth the minimum scheme of air pollution abatement the states must undertake to gain federal approval, with Section 116 telling them that they may go further. Each state was to retain the "primary responsibility for assuring air quality" within its bound-

aries. Section 107(a); *Train* v. *Natural Resources Defense Council, Inc., supra.*

3. Congress intended that individual sources of pollutants would seek relief from the state, where compliance with an implementation plan was alleged to be infeasible.

Each state was free, under Section 110 and 116, to choose the mix of emission limitations which best suited its needs and societal goals, so long as such mix will attain and maintain national standards. Each state was also free to adopt air quality standards, emission limitations and control schemes more stringent than necessary to pass muster under Section 110. Section 116. However, such more stringent measures would not be subject to disapproval by the Administrator, even if they were more costly or more difficult to comply with. If, under the state plan compliance would be technologically impractical or economically unsound, as to a particular source of pollution, resort may be had to the state administrative agency for a variance. *Train* v. *Natural Resources Defense Council, Inc., supra.* Such relief would be allowed under the Clean Air Act, so long as it did not interfere with attainment and maintenance of some national standard. *Id.*

If, on the other hand, the national standards for a particular pollutant would not be attained, or maintenance was threatened, by noncompliance by a particular source, the variance procedure would be of no help to that source. Compliance must be achieved, even if difficult or impractical, for Congress had so ordered.[5] Section 110(a)(2)(A)

[5] We submit that only where national standards are being met and maintained can an individual source challenge an emission limitation on grounds that, as applied to it, the limitation is infeasible. *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F.2d 390, 411-412, rev'd. on other grounds, sub. nom. *Train* v. *Natural Resources Defense Council, Inc., supra.*

Of course, if the state wished to shift the burden of compliance with national standards to other sources, so that the societal impact due to compliance by a particular source was minimized, then it could do so by revising its mix of emission limitations (e.g., imposing more stringent limitations on other sources) to ensure attainment and maintenance. Again, Congress left this essentially legislative determination to the state, and not to the Administrator.

requires attainment of primary standards not later than three years from the date of approval of the state plan.[6] In the case of primary standards, Congress has set the deadline; it "reflects a limit beyond which Congress has chosen to disregard arguments of 'impracticability'." *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839, 844 (7th Cir. 1975).

In the situation at hand, Union Electric has obtained variances from Regulation X(B) pursuant to Missouri law.[7] Union Electric also has pending before the Missouri Air Conservation Commission applications for further vari-

[6] In the case of Missouri plan, May 31, 1975. 40 C.F.R. §52.1332. We submit that any question regarding Missouri's implementation plan to meet national primary standards is moot, as the deadline set by Congress has now passed.

[7] Section 203.110, Revised Statutes of Missouri, provides:

"1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission, or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.

2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by air contaminants emitted by the applicant."

ances from Regulation X(B). We submit that questions of the economic and technological feasibility of compliance with state-promulgated emission limitations are, as asserted by the court below, matters best solved by the states.[8]

As pointed out above, the states are free, pursuant to Section 116, to adopt standards and limitations more stringent than those minimally required to attain and maintain national ambient air quality standards. The inclusion of such more restrictive standards and limitations in a state-submitted plan would not, however, indicate a need for the Administrator, or for the Courts of Appeals in Section 307(b) proceedings, to address the technological or economic feasibility of compliance with such plans.

The more stringent emission limitations[9] would presumably reflect a desire on the part of the people of the submitting state for cleaner air. In the case of limitations which were more restrictive or costly to achieve, they would also reflect a decision that particular sources should either comply, or curtail their operations. Such would be a choice which the state could make, in determining its own requirements for the protection of the public health and welfare.

If, as petitioner has alleged, compliance with such a limitation would cause great social or economic dislocation, then the affected source could seek a variance before the

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[8] Neither in its pleadings nor in its Brief has petitioner challenged the validity of Regulation X(B) as it applies to all sources in the St. Louis Air Quality Region. Petitioner only alleges that as to its plants, the emission limitation in such Regulation is economically and technologically infeasible. Whether petitioner ought be put to the trouble and expense of installing sulfur dioxide control equipment, with the resultant societal impact (of whatever magnitude), is a question which should be explored and answered by the State of Missouri, and not by EPA or the federal courts.

[9] More restrictive air quality standards would *per se* require more restrictive emission limitations.

state administrative body. Where the affected source's point was well taken, relief would presumably be granted. If not, the essentially legislative choice would have been made, the wisdom of which would not be subject to question by the Administrator, or the federal courts. *Train* v. *Natural Resources Defense Council, Inc., supra.*

In *Train* v. *Natural Resources Defense Council, Inc., supra,* this Court held that variances from an EPA approved implementation plan could be granted through a revision to such plan under Section 110(a)(3). That is, compliance with an emission limitation or deadline by an individual source may be deferred, so long as national standards are being attained and maintained. We submit that if the Administrator has no discretion to disapprove a waiver or delay of compliance by a particular source, where the requirements of Section 110(a)(2)(A) are being met, then he also has no discretion to disapprove a plan when submitted, so long as Section 110(a)(2)(A), and other requirements of Section 110(a)(2), are or will be met.

The act of approving a revision to a plan, and the act of approving the plan initially, are essentially the same task. In each case, the determination is mathematical, involving a calculation whether the absence of emission reduction by a source will cause a national standard to be violated. In either case, the Act gives the Administrator essentially no discretion to disapprove, if national standards are being met. Therefore, we submit that this Court's decision in *Train* v. *Natural Resources Defense Council, Inc., supra,* controls the issues in the case at bar.

It has been argued that in order for the Administrator to determine whether a state plan will assure attainment and maintenance of national standards, within the times specified in Section 110(a)(2)(A), he must necessarily engage in an assessment of the technological and economic

feasibility of the plan. This proposition is based on the assumption that an emission limitation which would in fact prove difficult or impractical for an individual source to achieve, other than by cessation of operations, would not be enforced, and would result in the non-attainment of national standards. Contrary to that assumption, this Court must presume that the law would be enforced.

As a matter of law, any state plan which contains standards and limitations at least as stringent as those minimally required under Section 110(a)(2)(A), would assure attainment and maintenance. Presuming the law to be enforced, attainment and maintenance would be achieved in one of three ways. First, the source may meet the emission limitation by that choice of abatement methods and procedures which best suits its own operations and needs. Second, if compliance by emission reduction techniques is technically impossible or economically infeasible, and a national standard is being violated, or maintenance threatened, that non-complying source must curtail operations, for Congress has said that the national standards must be met. In the alternative, the state might decide to revise its mix of emission limitations, so that the particular source would have a less stringent limitation applicable to it. The new mix, however, must still assure attainment and maintenance of national standards. Third, if no threat to national standards exists, the non-complying source could apply to the state administrative body for relief, with the right also to seek review in the state courts. Such relief, if granted, would not run afoul of Section 110. The refusal of relief, if lawfully done, would constitute a legislative (public policy) decision of the particular state.

Petitioner has suggested that there are stronger considerations for raising questions of technological and economic feasibility in Section 307(b) proceedings, where those questions arose after the administrator's approval of the

state plan. Under our view of the Clean Air Act, we see no such distinction. In either case, the determination of questions of impracticability or impossibility would be raised at the state level, in variance-type proceedings. At the federal level, such questions would be raised, as discussed in Point II, *infra*, in a conference with the Administrator and/or in enforcement proceedings. Under such circumstances, it makes no difference whether the factors causing the alleged infeasibility arose before or after the Administrator's approval of the plan.

In light of our argument above, one might ask the meaning of the language in Section 307(b)(1), providing for filing a petition for review more than thirty days after the Administrator's approval of a plan, if such petition is based on grounds arising after the thirtieth day. Under this provision, at least three types of grounds for review could arise, with regard to state implementation plans:

(1) It is alleged, on the basis of new ambient air quality data or the existence of new sources, that national standards will not be met within the time period specified in Section 110(a)(2)(A), or that maintenance of national standards is seriously threatened;

(2) The state is not enforcing the plan because it has lost legal authority or administrative capacity to meet the requirements of Section 110(a)(2)(C)-(H);

(3) New technology has been developed which will allow attainment of national standards more quickly than specified in the plan.

This interpretation of the last sentence of Section 307(b)(1) is supported by the clear purpose of the Act to cleanse the nation's air as soon as possible. Our interpretation of Sections 110 and 116 does not render Section 307(b) a nullity. It provides for review directly in the Courts of

Appeals when it is alleged that national standards are not being achieved or maintained, or will not be achieved as soon as Congress has directed.[10]

Finally, it is important to note that we are not talking about implementation plans merely to control emissions from three electric power plants belonging to petitioner. We are discussing the process by which a state develops and submits, and the Administrator approves, a plan to abate emissions from the thousands of sources of air pollution existing in each state. Many of those sources emit several of the pollutants for which national standards have been developed. It would be impossible for the state, or for the Administrator if he had been given the responsibility, to determine with exactitude, at the time plans are developed, the ability or desirability of each and every source to meet the emission limitations on time. Individual circumstances will, for the most part, have to be determined on a case-by-case basis, after the implementation plan is in effect. Were it otherwise, the goals of the Clean Air Act could not be achieved in the time frame set by Congress.

C. The decisions of the Courts of Appeals which support the petitioner's arguments were decided incorrectly.

We now turn to a discussion of the decisions which

[10] The last sentence of Section 307 (b) (1) would also require Court of Appeals review of new information regarding the hazardous nature of any pollutant for which national standards have been promulgated, as pointed out by the court below (A-23 and A-24, Pet. for Cert.). It would also require review of the Administrator's action in promulgating standards, limitations or prohibitions pursuant to Sections 111, 112, 202, 211 and 231. Such review would include review based on factors arising more than thirty days after the Administrator's action, which affect technological or economic feasibility, if the appropriate section makes the assessment of economic or technological feasibility a criterion for the Administrator's determinations. Of course, such review would be in the Court of Appeals for the District of Columbia.

bear on the issue at hand, with the purpose of showing why the cases cited by petitioner for support are incorrect. The premier case is *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972). There a challenge to the Pennsylvania plan was brought in the district court. The Third Circuit held that the district court lacked jurisdiction to hear the challenge, as questions of technological and economical feasibility could be raised only in a Section 307(b)(1) proceeding.

The *Getty Oil* court reached its conclusion that questions of feasibility are reviewable under Section 307(b)(1) without indicating why the Act required such a holding. See 467 F.2d at 356. In fact, the conclusion reached runs counter to the reasoning followed in the rest of the opinion. The court recognized that the Act "says nothing about deferring compliance *merely* because such technology is not available." [Emphasis in original] 467 F.2d at 559. The court also recognized that it had no constitutional or statutory authority to substitute its judgment concerning a variance for that of the Pennsylvania administrative agency. 467 F.2d at 358. And the court found that the plaintiff had been afforded due process at the rule-making stage. 467 F.2d at 356.

Despite all of this, the *Getty Oil* court decided, without discussing its underlying rationale, that questions of feasibility should be raised in Section 307(b)(1) proceedings. We think that the court simply failed to undertake a careful analysis of the purpose of the Clean Air Act, particularly with regard to Sections 107, 110 and 116. Perhaps it was misled by the "exclusive forum" issue, 467 F.2d at 356, into believing that provision of a forum in which review might occur (Section 307(b)(1)) necessarily meant that review must occur there.

Whatever the reasoning behind the *Getty Oil* decision,

it provides the sole rationale for the holding of the Third Circuit in *Duquesne Light Co.* v. *EPA*, 481 F.2d 1 (3d Cir. 1973) (hereafter *Duquesne I*). In that case review of state plans was sought directly in the Court of Appeals pursuant to Section 307(b)(1). The court's holding was that the plaintiffs had not received an adequate hearing at the state level, prior to promulgation of the state plan. Therefore, EPA could not proceed to enforce the state plan until either (1) the state administrative and judicial remedies were concluded, or (2) EPA gave the plaintiffs a limited legislative hearing on their feasibility arguments. 481 F.2d 10.

It is obvious from the Third Circuit's discussion leading to the holding of *Duquesne I*, that its holding in *Getty Oil* controlled the decision. That is, claims of economic and technological infeasibility being reviewable in Section 307(b)(1) proceedings, such claims are barred by Section 307(b)(2) from being raised in federal enforcement proceedings. Therefore, according to the court, plaintiffs would be denied due process unless they had an opportunity to present their feasibility claims before sanctions were imposed in federal enforcement proceedings.

Duquesne I and *Getty Oil* both rest on a premise that Section 307(b)(2) prohibits raising economic and technological feasibility questions in federal enforcement proceedings; therefore such claims must be raisable in Section 307(b)(1) proceedings. Neither case inquired into why or what section of the Clean Air Act required the Administrator to assess such factors. Neither case inquired into the intent of Congress, and neither case is persuasive authority for the proposition for which it is cited.

The Third Circuit squarely addressed the issue of technological and economic feasibility in *St. Joe Minerals Corp.* v. *EPA*, 508 F.2d 743 (3d Cir. 1975). In holding that

the Administrator was required to assess feasibility when approving state plans, the court based its decision on the following factors:

(1) If Congress had intended that Section 110(a)(2) limit the Administrator's authority to review feasibility, it would have said so explicitly;

(2) Section 116 of the Act does not prevent the Administrator from adopting in an implementation plan a restriction which is less stringent than that which the state has adopted for state enforcement;

(3) The "as expeditiously as practicable" language of Section 110(a)(2)(A) shows that the Administrator should evaluate the workability of emission limitations submitted by a state;

(4) The Administrator submits each state plan to a committee, composed of members from other federal agencies, which necessarily looks at the feasibility questions. 508 F.2d at 748-749.

We have already addressed the first three basis for the court's holding in *St. Joe Minerals*. Therefore, we need not address them again, other than to reiterate that the Act on its face refutes the court's reasoning. The fourth basis for the court's holding has not been previously addressed.

We submit that the Administrator's practice of submitting state plans to other federal agencies for comment in no way bears on Congress' intent in providing, in Section 110, for approval of state implementation plans. In fact, the argument amounts to no more than bootstrapping. The rationale apparently is that the Administrator submits the state plans to agencies which could comment on various technological and economic impacts; therefore the Administrator is assessing technological and economic feasi-

bility; *ergo* the Act requires the Administrator to assess such factors. The logic of this proposition is clearly faulty.

The essential question is not what the Administrator does, but what is he required to do by Section 110? We have previously argued at length the duties of the Administrator under Section 110, and need not repeat the arguments here. Suffice it to say that we believe that Section 110 does not require the Administrator to address technological and economic feasibility, and any such assessment by other federal agencies is outside the scope of Section 110.

The fourth and most recent case decided by the Third Circuit is *Duquesne Light Company* v. *EPA*, 8 E.R.C. 1065 (3d Cir., Aug. 21, 1975) (hereafter *Duquesne II*). This case arose out of a new challenge to the Pennsylvania implementation plan, following the hearing held by EPA pursuant to *Duquesne I, supra*. The opinion in *Duquesne II* is an examination of the merits of the plaintiffs' feasibility arguments, and contains no useful discussion of the issues before this Court. In fact, the court merely refers to its previous cases in stating that economics and technology are matters which the Administrator must consider when passing on an implementation plan. 8 E.R.C. at 1066. *Duquesne Light II* provides no help to petitioner or this Court.

The four cases discussed above constitute the position of the Third Circuit on the issue before this Court. As pointed out, only *St. Joe Minerals Corp.* v. *EPA, supra,* adequately addresses the issue. We have shown by our argument that the conclusions reached in that case were an incorrect interpretation of the Clean Air Act.

Turning to the Fourth Circuit, we find *Appalacian Power Co.* v. *EPA*, 477 F.2d 495 (4th Cir. 1973). This challenge was filed directly in the Court of Appeals pursuant to Section 307(b)(1). The court, in determining that the

Administrator must consider economic and technological feasibility when approving state plans, found the following bases for its conclusion:

(1) Section 307(b)(2) means that an implementation plan is not subject to review, in any respect, in an enforcement proceeding. 477 F.2d at 499;

(2) Although the Administrator need not hold a hearing before approving a state plan, he must determine that the state adequately addressed economic and technological feasibility. This determination is subject to review in Section 307(b)(1) proceedings. 477 F.2d at 504;

(3) The Administrator conducts research and provides information to the states concerning technological and economic feasibility. Therefore, the Administrator necessarily considers such matters. 477 F.2d at 505-506;

(4) State plans are submitted to an inter-agency committee, and its is inconceivable that this committee, *ergo* the Administrator, does not consider economic and technological feasibility. 477 F.2d at 506;

(5) The Administrator must determine whether the state plan will achieve national standards within the time allowed by the Act. This necessarily involves assessment of feasibility. 477 F.2d at 506.

The last two bases for the Fourth Circuit decision have already been discussed and refuted in Part B, *supra,* and in the discussion regarding *St. Joe Minerals Corp.* v. *EPA, supra,* and need not be discussed further. The third basis, that the Administrator does conduct research and inquiry into technological and economic matters in order to aid the states in their task, provides no logical basis for concluding that Section 110(a)(2) requires the Administrator to assess such factors in approving state plans. As with the argument concerning the inter-agency com-

mittee, it is nothing more than bootstrapping. That is, the Administrator is aware of feasibility questions, and provides information to the state agencies on such matters; therefore, Congress must have intended that the Administrator consider feasibility in the context of Section 110(a)(2) approval. This rationale simply overlooks the clear language of Section 110 itself.

The second rationale for the *Appalacian Power* decision, that the Administrator must determine whether the state agency adequately considered economic and technological questions, ignores the state/federal dichotomy imbedded in the Act. See *Train* v. *Natural Resources Defense Council, Inc., supra.* It is the state which must consider questions of the societal impact of a particular scheme of air pollution abatement (mix of emission limitations). As argued before, if the state chooses to set its emission limitations in such a manner that a particular source might have to curtail operations to meet the limitations, that is a legislative choice left to the state by the Act.

The first ground relied on by the Fourth Circuit for its holding is really the key to its decision. The court concluded that Section 307(b)(2) precluded the raising of *any* arguments regarding the application of a state plan, as to an individual source, in federal enforcement proceedings. However, Section 307(b)(2) precludes petitioner from raising in enforcement proceedings only those arguments which were relevant in Section 307(b)(1) review proceedings, not every argument a source might have against the application of an emission limitation to it.

We will further discuss this aspect of this *Appalacian Power* case in Point II, *infra.* Suffice it to say that we believe that the whole rationale of the Fourth Circuit's decision was based on the incorrect premise that Section 307(b)(2) precluded raising feasibility challenges in federal

enforcement proceedings; *ergo* such challenges must be raised pursuant to Section 307(b)(1). This constituted putting the cart before the horse, and necessarily controlled the outcome of the case. The Fourth Circuit simply failed to properly analyze what factors were relevant to the Administrator's inquiry under Section 110(a)(2), and therefore relevant in Section 307(b)(1) proceedings.

The last case cited by petitioner as supporting its position is *Buckeye Power, Inc.* v. *EPA,* 481 F.2d 162 (6th Cir. 1973).[11] That court, in a Section 307(b) proceeding, concluded:

(1) The Administrative Procedure Act requires the Administrator to hold a limited, legislative-type hearing before approving state implementation plans;[12]

(2) The Act shows that the Administrator need not fully consider the impossibility claims of the plaintiffs, because of time constraints placed on the Administrator by the Act; therefore, such claims can be raised in enforcement proceedings. 481 F.2d at 165.

Rather than supporting petitioner's argument, this case cuts against it. The court concluded that feasibility

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[11] *Amici,* Appalacian Power Co., *et al.,* cite two additional cases, *South Terminal Corp.* v. *EPA,* 504 F.2d 646 (1st Cir. 1974) and *District of Columbia* v. *Train,* 521 F.2d 971 (D.C. Cir. 1975), to support petitioner's proposition. Those cases are inapposite, as they deal with EPA promulgation of transportation control plans. In each case the essential question was the necessity for the particular requirement. 504 F.2d at 671-676; 521 F.2d at 997. The Administrator is clearly not authorized to establish control schemes (these were not emission limitations) more restrictive than required to attain and maintain national standards. In addition, where EPA, rather than the state, is developing an implementation plan, it would consider feasibility, as the states do in developing their implementation plans.

[12] This issue, although raised by *amici* Appalacian Power Co., *et al.,* was not raised by petitioner in its pleadings (Appendix, pp. 2-9), or in the Petition for Certiorari. Therefore, this issue is not now before this Court.

was relevant under the Act, but did not specify at what stage of the process it was relevant. 481 F.2d at 168-169. The court did conclude, however, that because of the four-month time limitation on the Administrator's approval of state plans, he could not fully consider feasibility claims at that stage. Therefore, the court holds, such claims can be fully raised as a defense in enforcement proceedings. 481 F.2d at 173.

While not advocating that this Court adopt the approach taken by the Sixth Circuit,[13] we do think that *Buckeye Power* raises a compelling argument for the interpretation of the Act we advance. Surely Congress could not have intended that the Administrator meet the deadlines contained in Sections 109 and 110(a)(1), so that a system of air pollution abatement to protect the public health and welfare could be quickly implemented, and also intend that he fully consider the myriad economic and technological claims of the numerous stationary sources. The two functions are simply incompatible, and Congress cannot be presumed to have intended such an absurd result. For the Administrator to meet the statutory deadlines, and for the abatement program to get under way quickly, it is logical to assume that Congress intended that claims of individual infeasibility be considered by the state administrative agencies, and at the enforcement stage in the federal courts.

We find further support for our argument in *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839 (7th Cir. 1975). In that case two power companies challenged the state plan on grounds of economic and technological feasibility. In holding that such questions need not be considered by the Administrator in approving state plans under Section 110, the court adopted the same rationale as we have

[13] The *Buckeye Power* case is a perfect example of the confusion which can result from undue reliance on contradictory legislative history.

advanced in this Brief. Rather than engage in another discussion of these points, we merely cite the Court to the Seventh Circuit opinion. We would point out that the Seventh Circuit did not find it necessary to resort to the legislative history of the Clean Air Act to determine the intent of Congress with regard to Section 110. It found the Congressional intent on the face of the Act, as we believe this court should. We submit that *Indiana & Michigan Electric Co.* v. *EPA, supra,* is the better reasoned approach to interpretation of Section 110.

Such an approach better serves the state/federal relationship embodied in the Act, yet takes nothing from petitioner's rights. It also is in agreement with the result reached by the court below. We urge this Court to adopt the approach of the Seventh Circuit, and the result of the Eighth Circuit, and hold that in approving state implementation plans under Section 110, the Administrator need not consider matters of economic and technological feasibility.

II. Petitioner will not be denied due process of law if it cannot raise issues of technological and economic feasibility in Section 307(b) proceedings, as it has available to it other remedies and other forums for review.

It is undeniable that the Due Process Clause requires that petitioner receive, at some point, a full and fair hearing on any relevant feasibility arguments.[14] *Boddie* v. *Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). However, there is nothing within the parameters of the Due Process Clause which would dictate that a Section 307(b) proceeding is the only means by which petitioner can receive due process. Section 307(b) review is a

[14] We will assume for purposes of this argument that economics and technology are relevant to the enforcement of implementation plans. However, the Court need not decide this question in the case at bar.

special proceeding created by Congress to review the Administrator's actions under various sections of the Clean Air Act. Congress apparently felt that a quick review process was desirable, as it chose to bypass the district courts. Congress also put a thirty day limitation on the filing of petitions for review under Section 307(b), again in an effort, apparently, to ensure quick review.

However, there is nothing in Section 307(b) which would in the least way indicate that Congress intended that such proceedings would be the exclusive method of raising all possible issues associated with the promulgation of implementation plans. We have no quarrel with the petitioner's assertion that Congress could, if it wanted, provide for the determination of economic and technological feasibility questions, in the first instance, in the Courts of Appeals. However, the provision for such review does not necessarily follow from the power to do so.

As discussed previously, it is clear that Congress intended, in regard to state implementation plans, that only those factors which the Administrator considered pursuant to Section 110(a)(2) would be reviewed in Section 307(b) proceedings. We have also argued that economic and technological feasibility are not among the factors to be considered by the Administrator pursuant to Section 110. If such propositions are correct, then petitioner can receive his day in court during any enforcement proceeding taken pursuant to Section 113.

A. Section 307(b) does not preclude review of questions of economic and technological feasibility at the enforcement stage.

Petitioner points to Section 307(b)(2) as evidence that feasibility questions must be necessity be raised in Section 307(b) review proceedings. Section 307(b)(2) states:

> "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

However, petitioner's argument[15] disappears if this Court holds that feasibility questions are not reviewable in Section 307(b) proceedings. For if these matters cannot be raised pursuant to Section 307(b)(1), then Section 307(b)(2) would not prevent their being raised in enforcement proceedings. See *Indiana & Michigan Electric Co.*, 509 F.2d 839 (7th Cir. 1975); *Reichhold Chemicals* v. *EPA*, 8 E.R.C. 1207 (7th Cir. 1975). Petitioner concedes that it would be afforded due process if given the opportunity to raise its easibility arguments in an enforcement proceeding (Pet. Brief, p. 31).

B. Petitioner can also apply for relief, and obtain a full and fair hearing, in state administrative and judicial tribunals, as well as presenting its feasibility arguments in a Section 113 conference with the Administrator.

We submit that petitioner will have two other opportunities to present its feasibility arguments, and thus receive due process. The first opportunity, coming before federal enforcement proceedings, is in a conference with the Administrator pursuant to Section 113(a)(4). That paragraph states:

> "An order issued under this subsection . . . shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. . . . Any order issued under this subsection shall state with reasonable spe-

[15] Similar positions have been taken by the Third and Fourth Circuits. *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d. Cir. 1972); *Appalacian Power Co.* v. *EPA*, 477 F.2d 495 (4th Cir. 1973).

cificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. . . ."

It should be noted that the Administrator may proceed with a civil action without the issuance of a compliance order. However, if such order is issued before a civil suit is commenced, petitioner will have an opportunity to present its feasibility arguments to the Administrator. Such is clearly implied by the requirement that the order take into account "any good faith efforts to comply." *Indiana & Michigan Electric Co.* v. *EPA, supra,* at 846.

The second, and more significant, opportunity for presentation of feasibility claims is in the state administrative and judicial tribunals. *Indiana & Michigan Electric Co.* v. *EPA, supra.* As noted before, petitioner may apply to the Missouri Air Conservation Commission for a variance from Regulation X(B), and has done so in the past. The Commission has wide lattitude in considering matters of social impact. Section 203.110, RSMo.

Whether a particular source must comply with a state regulation (plan), or may receive a variance therefrom because the societal impact of compliance is too great, is essentially a legislative choice. Congress has answered the question where national standards are being violated. Section 110(a)(2)(A). Congress has left such determinations to the state, and not to EPA, where national standards are being maintained. Section 110(a)(3); Section 116; *Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975). By presenting its feasibility arguments to the state administrative agency, a particular source receives its required hearing on such issues. The right to an administrative hearing implies the

right to review in the state courts. In this way, the source is assured of receiving its full and fair hearing, as required by the Due Process Clause.

Petitioner did not raise in its pleadings any question of denial of due process for failure of the Administrator to hold a hearing before approving the Missouri plan. Nor is this question contained within the question for which certiorari was granted. Therefore, such question, although argued in the Brief of *amici* Appalacian Power Co., *et al.,* is not before the Court. We will not brief this point. However, it is well settled that even if a hearing is required before administrative action is taken,[16] the opportunity for judicial review before sanctions are applied satisfies any due process requirements. *Nickey* v. *Mississippi,* 292 U.S. 393, 54 S.Ct. 743, 78 L.Ed. 1323 (1934); *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); *Indiana & Michigan Electric Co.* v. *EPA, supra.*

Mention has been made by several of the Courts of Appeals of the so-called Getty Oil dilemma. In *Getty Oil* v. *Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), the court concluded that questions of feasibility could be raised in Section 307(b)(1) proceedings, but not in enforcement proceedings. The plaintiff in that case had not filed a Section 307(b)(1) petition within the thirty day limit, but instead had filed a petition for declaratory judgment in the district court. The Administrator contended that Getty Oil could obtain relief via the state agency. The court noted, however, that Getty could still face federal prosecution before the state proceedings were concluded and a revised implementation plan was approved. Therefore, the state proceedings were of no help to Getty.[17]

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[16] We are not conceding that due process required such a hearing. Again, the question was not raised by petitioner.

[17] This apparent dilemma may be the reason the court in

The Getty Oil dilemma vanishes, however, where the court holds that feasibility claims can be presented in federal enforcement proceedings. See *Indiana & Michigan Electric Co.* v. *EPA, supra.* If petitioner can raise infeasibility as a defense in a federal enforcement proceeding (should prosecution occur before the Missouri variance proceedings are completed), then it will have received due process. *Id.; Rowan* v. *United States Post Office Dept., supra; Nickey* v. *Mississippi, supra.* In the situation where national standards are being attained or maintained, it would be logical for the Administrator to abstain from enforcement until state proceedings are concluded. However, the Getty Oil dilemma exists only where it was held that feasibility arguments could not be raised in enforcement proceedings.

III. A holding that petitioner cannot obtain review of questions of economic and technological feasibility in Section 307(b) proceedings will best serve the state/federal relationship embodied in the Clean Air Act, and will avoid the procedural and practical difficulties of injecting technical factual issues into the appellate level in the first instance.

In *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 95 S.Ct. ____, 43 L.Ed.2d 731 (1975), this Court recognized that under the Clean Air Act the states have the primary role in determining how national ambient air quality standards will be met. The state/federal relationship was obviously a major concern for Congress when writing the Act, for the Act draws an important distinction between the role of the Administrator and the roles of the various states in abating air pollution. We submit that only by holding that questions of economic and technological

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Duquesne Light Co. v. *EPA*, 481 F.2d 1 (3d Cir. 1973), granted the alternative remedies of abstention from federal prosecution until the state proceedings were concluded, or a limited hearing before the Administrator.

feasibility are not a part of the Administrator's inquiry under Section 110(a)(2), and thus not reviewable in Section 307(b) proceedings, will that distinction be adequately preserved.

If this Court holds as we request, questions of feasibility will continue to be decided at the level most sensitive to societal impacts, and most interested in adjusting the competing demands of various segments of society. In that way, all of society is benefited to the maximum extent possible. If, on the other hand, this Court holds that questions of feasibility are relevant to the Administrator's inquiry under Section 110(a)(2), we believe that the decisions, often legislative in character, affecting the delicate balance between clean air and the local economy, will as a practical matter be made by EPA and the federal judiciary.

Despite the ability of the Administrator to make, and the federal courts to review, policy decisions concerning air pollution abatement as it affects local interests, such decision-making should not be removed from the states unless Congress clearly intended such a result. We submit that such an intent on the part of Congress is not clearly expressed in the Act. Therefore, we encourage the Court to take that approach to the interpretation of Section 110(a)(2) which best preserves the states' role in air pollution abatement.

Moreover, the initial review of questions of economic and technological feasibility in the Courts of Appeals presents procedural and practical difficulties not found when such questions are raised, in the first instance, before the state administrative agencies and federal trial courts. The latter tribunals are better equipped for dealing with difficult factual, highly technical problems. While there is some doubt whether the Courts of Appeals can appoint masters to aid them, there is authority for the proposition

that such power in inherent. See *Union Electric* v. *EPA*, *supra*, A-7 of Pet. for Cert. Certainly, however, such procedure is not the normal course of action. Apparently, the court below felt that such a procedure was not a desirable way of handling the factual issues presented by petitioner.

The Eighth Circuit is not the only court to express dissatisfaction with initial review of such matters at the appellate level. In a concurring opinion in *Texas* v. *EPA*, 499 F.2d 289, 321 (5th Cir. 1974), Judge Clark points out the problems of Section 307(b) review. He concludes by saying:

> "The subject matter of this action involves the health and welfare of millions of citizens, the continued business vitality of tens of thousands of firms and compliance expenditures costing billions of dollars.
>
> "These extensive rights deserve a more orderly process of judicial reflection." *Id.*, at 322.

See also, *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 665 (1st Cir. 1974).

The practical effect of allowing feasibility questions to be raised in Section 307(b) proceedings is well illustrated by the situation which now exists in the Third Circuit. Because of the holding in *Getty Oil* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), the deadlines for attainment of emission limitations for sulfur dioxide in Pennsylvania, as to some sources, have been delayed until 1977, and could be delayed even longer. See *Duquesne Light Co.* v. *EPA*, 8 E.R.C. 1065 (3d Cir. Aug. 21, 1975). Such delay can obviously affect attainment of national standards. This is clearly contrary to the intent of Congress, expressed in Sections 109 and 110, to require attainment of national primary standards by mid-1975. Had the feasibility claims of those sources been presented to the state agency instead, such delay would not have occurred.

While the practical and procedural problems mentioned above do not by themselves mandate a holding that feasibility questions are not reviewable in Section 307(b) proceedings, an interpretation of the Act which avoids those problems certainly would be reasonable. In addition, an interpretation of the Act which best preserves the state/federal dichotomy embodied in the Act is warranted. Therefore, we urge the Court to take that view of the Act which best serves these interests.

CONCLUSION

We urge the Court to adopt the approach taken by the Seventh Circuit, and uphold the decision of the court below, by interpreting Section 110(a)(2) of the Clean Air Act to exclude questions of economic and technological feasibility from the inquiry of the Administrator in approving state implementation plans. We further urge the Court to adopt that interpretation of the Clean Air Act which best preserves the states' primary role in the scheme of air pollution abatement. Therefore, we urge that the decision of the court below, dismissing the petition of Union Electric Co. for lack of jurisdiction, be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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INDEX

Page

Foreword 1

Respondent EPA's Brief 2

1. Question Presented 2

2. Respondent's Statement of the Case 2

3. Respondent's Argument 4

(a) Petitions filed more than 30 days after EPA approval on grounds arising more than 30 days after such approval should not be treated the same as those filed within the 30 day period 4

(b) The Clean Air Act Amendments require judicial review of a provision in a state implementation plan, which is impossible to fulfill, when the National Ambient Air Standards will nevertheless be maintained (as they will be in this case) 7

(c) Since an Act of Congress should be interpreted to be constitutional, rather than unconstitutional, when reasonably possible, it is necessary (if there is any doubt about constitutionality) for this Court to consider the constitutional question .. 13

Intervenor-Respondent's Brief 14

The Brief of Amicus Coalition for the Environment 15

The Brief of Amicus State of California 17

Conclusion 17

CITATIONS

Cases

Oljato Chapter v. Train, 515 F.2d 654 5

Train v. Natural Resources Defense Council, 421 U.S. 60 .....4, 10, 16

Statutes

Clean Air Act

Section 110, 42 USC 1857c-5 9

Section 110 (a) (2) (H), 42 USC 1857c-5(a) (2) (H).... 6

Section 110(a) (3) (A), 42 USC 1857c-5 (a) (3) (A) 3, 6

Section 110(c), 42 USC-(5c) 10, 11

Section 110(e), 42 USC 1857c-5(e) 8

Section 110(f), 42 USC 1857c-5(f) 8

Section 111(a) (1), 42 USC 1857c-6(a) (1) 8

Section 113, 42 USC 1857c-8 .....12, 17

Section 113(a) (4), 42 USC 1857c-8(a) (4) 15

Section 202, 42 USC 1857f-1 8

Section 211(c) (2) (A), 42 USC 1857f-6c(c) (2) (A) 8

Section 231(b), 42 USC 1857f-9(b) 8

Section 307(b) (1), 42 USC 1857h-5(b) (1) 7, 8

Missouri

Section 230.110.4, R.S. Mo., 1969 3

Congressional Report

Report No. 91-1196 of the Senate Committee on Public Works, 91st Cong., 2nd Sess. (Sept. 17, 1970) 5

Law Review Article

Bleicher, Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources, 89 Harv. L. Rev. 316 (1975) 10

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REPLY BRIEF FOR PETITIONER

FOREWORD

Four briefs have been filed which take a position contrary to that of petitioner, namely, the brief of respondent EPA, the brief of intervenor-respondents State of Missouri and the Missouri Air Conservation Commission, the brief of *amicus curiae* Coalition for the Environment and the brief of *amicus curiae* the State of California. For some reason unknown to petitioner, none of these briefs attempts seriously to answer the bulk of the arguments set forth in petitioner's initial brief. This seems rather strange to us, since it is certainly customary in an answering brief to meet the arguments of your opponent, if it is at all possible to do so.

Under these circumstances we shall not engage in undue repetition of the arguments presented in our initial brief. Rather we shall answer the arguments which have been made in the four briefs mentioned above. And in doing so we shall first consider respondent EPA's brief, then discuss the points in intervenor's and amicus' briefs which have not already been covered.

RESPONDENT EPA'S BRIEF

1. Question Presented.

In its brief, as in its memorandum on the petition for certiorari (p. 2), respondent EPA states the question on which certiorari was granted differently and more broadly than it in fact is. Respondent does not confine the question to petitions filed more than 30 days after EPA approval on grounds arising after such 30-day period, although those are the facts of this case and that was the question on which certiorari was granted. Rather respondent broadens the question to include cases filed within the 30-day period, presumably because there are a number of such cases pending (as opposed to the instant, single case filed after the 30-day period) and respondent believes this Court should give the EPA some guidance. We have no complaint about giving the regulator (EPA) guidance. But we think fairness would also require that the regulated (such as Union Electric) be treated similarly.

2. Respondent's Statement of the Case.

Respondent points out that petitioner did not seek judicial review of the Missouri implementation plan within the 30-day period after promulgation (p. 5). Apparently its counsel's thought is to create some inference that petitioner did not pursue its "remedies." However, as we have repeatedly pointed out, the petition is based solely on grounds arising more than 30 days after promulgation. Additionally we mention that respondent devotes the remainder of its brief to the proposition that petitioner never in fact had the "remedies" that it infers.

In footnote 5 on page 6 of its brief, respondent EPA says that its May 30, 1974 notice of violation "included the Sioux Plant, even though the variance for that plant had not expired, because the variance for that plant (which ran to July 24, 1974) had not been submitted to EPA as a plan revision under Section 110(a)(3)(A) and was therefore not a part of the applicable implementation plan" (matter in parentheses added). We are really at a loss to know what respondent means by that statement which has absolutely no support in the record. If it is intended to infer that the Labadie and Meramec Plants were included in the notice of violation only because their state variances had expired, it makes no sense, because there is nothing in the Clean Air Act which requires the EPA to recognize state variances and it never has done so. If respondent's claim is that the Sioux state variance should have (or could have) been presented to the EPA as a revision under Section 110(a)(3)(A) of the Clean Air Act, it is equally without merit. This section of the Act says that the revision shall have been adopted by the State *"after reasonable notice and public hearing"* (emphasis added). But the Missouri statutes do not require any hearing as a condition to the grant of a variance.[1] Thus no Missouri

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[1] Section 203.110.4, R.S. Mo., 1969 says that

"Any person seeking a variance shall do so by filing a petition for variance with the executive secretary. The executive secretary shall promptly investigate the petition and make a recommendation as to the disposition thereof. Upon receiving the recommendation of the executive secretary, if the recommendation is against the granting of a variance, a hearing shall be held if requested as provided in section 203.100. *If the recommendation of the executive secretary is for the granting of a variance, the commission may do so without a hearing;* except that upon the petition of any person aggrieved by

variance can ever be approved by the EPA, unless the executive secretary of the Missouri Commission does not recommend the granting of a variance or there is an administrative contest in either of which events there would be a "hearing". Of course during the pendency of the administrative hearing and perhaps subsequent state judicial review, the EPA could proceed under the implementation plan as federal law. The result would be that the so-called "violator" might be fined large amounts or, if an individual, imprisoned, even though at the conclusion of all state hearings he was vindicated by the grant of a state variance and its approval by the EPA. Thus the Court's decision in *Train v. Natural Resources Defense Council*, 42 U.S. 60 (which incidentally came nearly a year after the Notice of Violation was issued by EPA against petitioner) is no answer to Union Electric's problems or those of any other Missouri company or person.

3. **Respondent's Argument.**

(a) **Petitions filed more than 30 days after EPA approval on grounds arising more than 30 days after such approval should not be treated the same as those filed within the 30-day period.**

Since the facts on which post 30-day review is sought must necessarily have arisen more than 30 days after the EPA approved the implementation plan, it should be perfectly clear that the EPA could not have made a record on those facts for

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the granting of the variance, a hearing shall be held as provided in section 203.100. In any hearing under this section, however, the burden of proof shall be on the person petitioning for a variance." (emphasis added) The great bulk of variances granted to petitioner, including this particular Sioux variance, as well as the great majority of those granted by the Missouri Agency to other parties, have been granted under the emphasized clause, that is without a hearing.

the Court of Appeals to review.[2] Consequently the Court of Appeals is going to have to conduct a factual inquiry, regardless of whether those facts relate to economic and technological feasibility or whether they are restricted, as respondent claims they should be, to facts "which, had they been known or in existence at the time the Administrator approved the plan, would have prevented him from giving his approval" (p. 12 of brief).

Respondent's interpretation of the "facts" which would permit post 30-day review is unreal and ephemeral. Its counsel does not provide us with an example of what he means and indeed he cannot. In truth there is absolutely no sensible or realistic situation that can be conjured up to give substance to his claim.

The only place the scope of facts permitting post 30-day review can be found is in the Senate Committee Report.[3] And there the Committee specifically stated its meaning that judicial review can be had "whenever it is alleged that significant new information has become available" (p. 42 of report). It should be perfectly apparent that such review must take into account this "significant new information"; and we cannot conceive of any new information which would be more important to a fair and proper administration of the act than new information demonstrating that it is technologically impossible to comply

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[2] There could be an administrative record for the Court to review *only* if, when a petition is filed with the Court of Appeals alleging grounds arising more than 30 days after EPA approval, the Court refers the matter to the EPA to investigate those grounds by an adjudicatory or legislative type hearing and then EPA files the record thus made with the Court. Nothing in the Clean Air Act permits such a procedure, but Courts have not been hesitant in interpreting the Clean Air Act the way they thought it ought to be. See, for instance, *Oljato Chapter v. Train*, 515 F.(2) 654, at pp. 665-6 (D.C. Ct. of App., 1975).

[3] Report No. 91-1196 of the Committee on Public Works, 91st Cong. 2nd Session (September 17, 1970).

with an emission limitation and that the economic cost to the public of an *attempt* to comply is manifestly against the public interest.

As we pointed out in our initial brief, Congress had in mind when enacting the Clean Air Act Amendments of 1970 the "fact" that "Greater use of natural gas for electric power generation may be required."[4] But Congress wisely realized that it did not know everything the future might hold. Thus it provided for a re-consideration of implementation plans in the light of new developments. And, as we previously noted, the complete extinguishment of any thought of using natural gas, the reduction in oil supplies, shortages and inefficiencies of low sulfur coal, and the failure to develop workable scrubbers are the important and significant new information crying out for a reappraisal of implementation plans. The type of new information, which counsel for respondent claims is all that is permissible and as to which he cannot give even one example, can hardly be other than petty inconsequential stuff—assuming that he is able to tell us what it is.

In footnote 10 on page 14 of its brief, respondent refers to the Energy Supply and Environmental Act of 1974. Of course that Act does not change Federally approved implementation plans in any respect. It simply says that a State *may* (but need not) submit a plan revision. But of course a state could have done precisely the same thing before this Act. See Sections 110(a)(2)(H) and 110(a)(3)(A) of the Clean Air Act.

If counsel for respondent is here inferring that Congress (or more correctly the executive appointees to the EPA) have complete and uncontrolled power to make final and judicially unreviewable decisions affecting the lives and fortunes of our millions of citizens, we certainly do not subscribe (and hope this Court will not subscribe) to such a totalitarian philosophy.

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[4] Id., p. 2.

In view of the Act's specific grant of a judicial review power on the basis of "significant new information", we submit that it is not the intent of Congress that the EPA be its own prosecutor, judge and jury.

(b) The Clean Air Act Amendments require judicial review of a provision in a state implementation plan, which is impossible to fulfill, when the National Ambient Air Standards will nevertheless be maintained (as they will be in this case).

In Section B on page 14 of its brief, respondent's counsel commence their discussion of a case, which this is not. That is they start their consideration (which is continued through most of the remaining part of their brief) of the scope of review of an EPA approved implementation plan by a petition to the Court of Appeals within 30 days after EPA approval.

Although that is not the situation in the instant case, we admit that the Eighth Circuit said in its decision that Section 307(b)(1) petitions should be treated the same, regardless of whether they are filed before or after expiration of the 30-day period; and we further admit that all of the decided cases involved petitions filed within the 30-day period.

Incidentally we note that counsel for respondent rely principally on decisions wherein the only parties were the Environmental Protection Agency and the Natural Resources Defense Council. Of course the question of judicial review of technical and economic feasibility was never actually presented in those cases. Neither of those parties was actually affected by such a question (so far as a particular case was concerned), and the utilities and industries (and the many millions of people they represent and affect) were neither represented nor heard. Thus all of the EPA-NRDC cases were decided on the basis of generalized, hypothetical situations. As we pointed out in our initial

brief (pp. 9-10), in every case wherein a utility or industry was a party (excepting only the instant case) the judges deciding it unanimously held that technological and economic factors may be judicially considered *at some time*.

On pages 17 and 18 of their brief, respondent's counsel intimate that only Sections 110(e) and 110(f) (42 USC 1857c-5(e) and (f) permit a consideration of technological or economic questions. But with respect to those sections, the Governor of the State must first take the initiative, and he is under no legal compulsion to do so. Thus we are dealing with political, not legal, matters. This impresses us as being much the same as saying that everyone arrested can be jailed without a trial and then released only if the Governor pardons him. Frankly we do not think our system of justice could have weathered the past 200 years, if based on political, rather than judicial, considerations.

In footnote 11 on page 18 of its brief, respondent refers to Section 111(a)(1) of the Act (which relates to standards for *new* stationery sources), to Section 202, which refers to emission standards for motor vehicles, to Section 211(c)(2)(A), which relates to control of fuels and fuel additives and to Section 231(b), which relates to aircraft emission standards. In each of those sections economic and technological factors are referred to, and EPA action must intially be taken in the light of them.[5]

Respondent makes the claim that Congress therefore intended that technological and economic factors cannot be considered

[5] We think it significant to note that Section 307(b)(1) directs a Court of Appeals (namely the one in the District of Columbia) to review the EPA's determination of technological and economic factors as to each type of emission covered by those four sections on grounds arising more than 30 days after EPA approval. Consequently the Court of Appeals would have to engage in these instances in the type of fact finding, which respondent seems so sure Congress never intended to require of a Federal Appellate Court.

insofar as state implementation plans are concerned, since those factors were not specifically mentioned in Section 110 (the implementation plan section).

We take an entirely different view of the matter. When the Clean Air Act Amendments were enacted in 1970, Congress did not have knowledge and knew it did not have knowledge of the economic and technical feasibility of possible requirements as to new stationary sources, motor vehicle emission standards, fuels and fuel additives or aircraft emission standards. However, it did then know, as was stated in its own Senate Committee Report,[6] that natural gas, if need be, could be utilized by utility and industrial plants to meet the air standards. Congress realized, however, that it was not infallible. Consequently it provided for judicial review in the event of significant new developments. Certainly the evaporation of Congress' idea that natural gas could solve the problem, along with the other new developments we have mentioned, constitute "significant new information" by which pre-existing implementation plans should be judged.

Pages 20 to 22 of respondents' brief, and the footnotes thereon, are replete with statements of the Senate Committee and Senators Muskie, Cooper, Prouty and Eagleton that an emission source must meet the Federal Standards or be closed down.[7] But none of the members of the Committee or individual Senators was ever asked the following truly significant question:

> "Senator, do you intend by this act to shut down a major portion of this country's electric generating plants, even

[6] See the preceding footnotes 3 and 4.

[7] As Union Electric alleged in its petition (A-13 and 14), both the National Primary and Secondary Air Quality Standards are being, and will continue to be, met, even though the Missouri emission standard in the implementation plan is not.

though the Federal Air Standards are being met and would continue to be met in the areas where those generating plants are located?"

We respectfully submit that each Senator would have emphatically responded "Of course not". And we think this Court should decide this case in the light of what it knows, and what virtually everybody else in the United States knows, would have been Congress' response. For that, we submit, really shows Congress' intent.

On page 24 of its brief, respondent implies that this case should be governed by the decision of the Court in *Train v. NRDC*, supra. We respectfully submit that the questions of technological and economic feasibility we present were never considered, let alone resolved, in that contest between the EPA and Natural Resources.

In his brief respondent's counsel refers to Bleicher's article in the December, 1975, issue of the Harvard Law Review[8] (p. 18 of brief), and we believe we should do the same.

On pages 350 and 351 of his article Professor Bleicher[9] discusses the situation where the EPA itself prepares a state implementation plan (as it may under Section 110(c)) and includes in such plan emission limitations that are stricter than necessary to meet the National Ambient Air Quality Standards. He quite properly comes to the conclusion that on judicial review such unreasonable emission limitations would have to be struck down by the Court of Appeals for the appropriate Circuit

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[8] Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316.

[9] Apparently he has only recently become a Professor, since at the beginning of the article (p. 316) he says that he was Deputy Director of Regulation and Enforcement in the Ohio Environmental Protection Agency until 1975.

as a violation both of the Clean Air Act and the Federal Constitution. Thus he says:

> "If the (unreasonable) requirement were imposed in a plan developed by the Administrator under section 110(c) (as where the state fails to submit an adequate plan), a subjectively unreasonable emissions limitation would at least violate statutory restraints on federal agency action, and perhaps the due process clause, because the Administrator would be destroying property for no apparent statutory purpose. To avoid taking illegal action . . . when he promulgated federal State Implementation Plans, the Administrator should give adequate consideration to technical and economic alternatives to subjectively unreasonable plans and afford relief where attainment of National Ambient Air Quality Standards or other statutory norms would not be jeopardized." (matter in parentheses added)

Turning now to the actual case before this Court, we have a situation where the emission limitation, which is unnecessary to fulfill National Air Quality Standards, was placed in the implementation plan by the State of Missouri. That plan, including this unnecessary emission limitation, was approved by the EPA and thus it has become Federal Law.[10] But respondent says that no matter how unwise, how unnecessary a provision in a state plan may be, neither the EPA nor the Courts nor the persons subject to it may ever raise any question about it. In other words both the EPA Administrator and the state can simply say, "I don't know if there is any reason for it, but it's the law." And the Court must accept that statement as final. We respectfully submit that this unique situation where a state purports to make federal law which the federal government itself could not legally make raises grave constitutional questions and surely could not be considered as reflecting the Congressional intent.

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[10] In fact respondent contends that the EPA had no choice but to take such action.

By far the most astounding part of respondent's brief is the following statement of its counsel on page 29:

> "In this case, petitioner's objections that it cannot comply with the state plan is a challenge to the wisdom of the State's choice and the appropriate place to resolve such matters is not in the federal court of appeals but in the responsible state agency. That indeed is the course petitioner is pursuing by seeking variances from the limitations affecting its three plants."

Does respondent mean by that statement that the Federal Courts have no authority with respect to state devised implementation plans, even though by EPA approval they have become Federal Law? Certainly the Clean Air Act itself (Section 113) gives the Federal Courts power to enforce them. Does respondent mean that EPA will not enforce the provisions of implementation plans while variance petitions are pending? If that is so, why did the EPA Administrator issue a notice of violation in the instant case. Certainly the past practice of the EPA has been to enforce the state devised implementation plan as Federal Law, quite regardless of what may be going on in State Courts or Administrative Bodies. Additionally as we earlier pointed out, state variances granted to utilities can rarely become EPA approved revisions of implementation plans, since they are normally (and legally) granted by the States without a hearing. And if there is a state hearing the process of ultimately getting a variance might take several years, during which the EPA could enforce the federal aspect of the plan by criminal conviction with attendant jail sentences and fines. Certainly it is not much of a victory for a person to ultimately obtain an EPA approved variance after paying large fines and/or spending several years in jail. Finally does respondent mean the EPA might stay its hand as a matter of grace during state proceedings. As to this we say that we are looking for protection by the law, not by the grace of the EPA.

Under this point, we want also to refer to respondent's contention on page 32 of its brief that this Court should adopt the EPA's interpretation of the Act, because administrative interpretations are entitled to great weight. We do not know whether EPA has issued an interpretative regulation on this point. But if EPA interprets the Act, as its counsel does in this case, that is to give itself the final, unreviewable, unquestioned right to make final, unreviewable, unquestioned decisions, which greatly affect the welfare of every person in the United States, we say that that is so far beyond the Congressional intent, as well as Constitutional guarantees, as to warrant this Court in stepping in.

As a very specific example we understand the EPA says that sulfur dioxide removal equipment is effective and will enable utilities to meet all state emission standards, which have by EPA approval become federal law. We say that this is not correct and that the installation of such ineffective equipment would cost so much that it would be manifestly against the public interest. The EPA apparently says that it should be entitled to make an unreviewable final decision on this matter, even though it intimately affects the welfare of everyone in the United States. We say that a final resolution of the matter should be made only after the testing process of an adversary judicial proceeding. We contend that this is what Congress intended, that a contrary intention would violate the Constitutional guarantee of due process and that an interpretation of Congress' intent should be made in the light of such Constitutional guarantee.

(c) Since an Act of Congress should be interpreted to be constitutional, rather than unconstitutional, when reasonably possible, it is necessary (if there is any doubt about constitutionality) for this Court to consider the constitutional question.

We believe that the foregoing proposition is subsidiary to the question on which certiorari was granted. Consequently respondent's statement outside the record as to briefs in the

Court of Appeals[11] and its statement as to the petition for certiorari are irrelevant. Virtually every Court or commentator that has dealt with this aspect of the Clean Air Act has considered the constitutional problem, and we do not see how this Court can justifiably do otherwise.

Despite the fact that respondent wants to brush aside the constitutional question, its counsel were impelled to consider the matter to some extent in their brief (pages 33-37). For one thing such counsel indicate that the Constitutional problem may be resolved in state judicial proceedings. But the state implementation plan becomes federal law enforceable by a federal court when approved by the EPA. As we have previously noted, the person paying large fines or, if an individual, perhaps imprisoned because of a federal conviction for violating federal law would hardly feel that his constitutional rights had been protected by the State Court's ultimate allowance of a state variance which EPA could and did approve.

We really have nothing to add under this point to the arguments presented at pages 29-32 of our initial brief. However, we again remind the Court that there can hardly be a clear and present danger to the welfare of the people of the United States, since the National Ambient Air Quality Standards are being fulfilled, even though the emission limitation is not.

INTERVENOR-RESPONDENTS' BRIEF

We believe that the arguments set forth in intervenor-respondents' brief have already been answered. However, there

[11] As a matter of fact we thought that the United States Court of Appeals for the Eighth Circuit would interpret the Clean Air Act in what we considered to be a constitutional manner without us mentioning the point.

are a couple of points we would like to make. On page 9 of their brief, intervenor-respondents state that the provisions of the Clean Air Act are clear and unambiguous. Consequently they assert that no resort to legislative history is necessary. We respectfully dissent from that view and submit that Congress has enacted very few statutes which are as obscure and ambiguous as the Clean Air Act Amendments.

On page 35 of their brief, as well as at other places, intervenor-respondents appear to contend that a conference with EPA officials, pursuant to Section 113(a)(4), constitutes a hearing which would satisfy the constitutional guarantee of due process.[12] We respectfully submit that this simply is not true. That section provides for a conference, not for a hearing. Thus it does not afford any legal rights to the person present. He is completely subject to the grace of whoever from EPA might be conducting or directing the conference. What the constitution requires, and what we want and believe we are entitled to, is the recognition of a legal right, which will be protected and enforced by the courts.

THE BRIEF OF AMICUS COALITION FOR THE ENVIRONMENT

We also believe that the arguments in this brief have already been answered. However, there are a few points we would like to make.

Apparently this amicus at least impliedly assumes that it is possible for petitioner to comply with the Missouri sulfur regulation. Thus on page 8 of its brief, counsel talks about the utilities being free to choose any method they desire to

[12] Respondent also implies that this is true in footnote 34 on pages 35-6 of its brief.

achieve compliance. We allege that compliance is impossible. And we think this question should be resolved in an adversary judicial proceeding, not by administrative fiat.

On page 11 of its brief amicus reaches outside of the record and states that at a January 5, 1972 hearing an executive vice-president of petitioner stated that if St. Louis people would spend $250,000,000 dollars, the SO_2 concentrations in the vicinity of the Labadie Plant would be greatly reduced. Apparently amicus desires by this statement to create the impression that sulfur dioxide removal equipment is completely effective.

We wish to point out that this statement was made long prior to the May 31, 1972 approval by the EPA of the Missouri implementation plan. In January 1972, when this statement was made, Union Electric was experimenting extensively (and expensively) with SO_2 removal equipment at its Meramec Plant. Many months after the implementation plan was approved, it was determined that SO_2 removal equipment simply would not do the job. And this is a part of the "significant new information", arising more than 30 days *after* the approval of the implementation plan, upon which our petition, which was brought more than 30 days *after* such approval, is based.

The only other reference we wish to make is to amicus' poetic fantasy on page 15 of its brief that this Court's decision in *Train v. NRDC, supra,* answers all of Union Electric's problems. That is absolutely not true, as we have already pointed out on several occasions.

THE BRIEF OF AMICUS STATE OF CALIFORNIA

We have studied this late arrival and do not believe it contains anything new. As we have previously indicated, we do not agree with California's apparent belief that it is proper to enact a law which says that the State will impose criminal penalties and civil sanctions upon a person until science develops a method of coping with a problem, even though there is no health hazard (since, as in this case, National Air Quality Standards are being met) and consequently there is no danger (let alone a clear and present one) to the public welfare. We note amicus' statement on p. 31 of its brief that section 113 could afford petitioner some relief, since in enforcement proceedings good faith efforts to comply should be considered. But, we submit, how can there be good faith efforts to comply in our case, since compliance is impossible. Additionally we want to register our belief that a discretion in the Administrative Agency and the Court to consider technical and economic factors in determining the penalties to be sought, or imposed, does not fulfill the constitutional guarantee of due process.

CONCLUSION

In our initial brief, at page 33, we said that the case should be remanded for the appointment of a Master to take evidence and make findings on the allegations in paragraphs 21 through 24 and 26 of our amended petition. Of course we did not mean to confine the scope of the facts to those enumerated allegations. We simply enumerated them, since we believe that they are the only ones which would be seriously contested. What we really pray is a remand of this case to the United States Court of Appeals for the Eighth Circuit for the purpose of appointing a master to hear evidence and make findings on the amended

petition and for the purpose of deciding the case on the basis of the master's report and the second prayer of such petition (A-8).

Respectfully submitted

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Appellant,

VS.

ENVIRONMENTAL PROTECTION AGENCY,
Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

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Subject Index

Page

Interest of Amicus 1

Opinion below 3

Argument 3

I

The administrator must consider economic and technological feasibility of compliance as relevant factors in approving or disapproving a state implementation plan 3

II

Approval by the administrator of a state implementation plan is arbitrary and capricious if it fails to consider relevant factors—economic and technological feasibility—and is therefore a clear abuse of discretion 7

III

Approval of an implementation plan without considering economic and technological feasibility violates the Clean Air Act 10

A

Failure to promote productive capacity 11

B

Failure to specify "reasonably available" control measures 11

C

Failure to approve a plan which will achieve national primary ambient air quality standards as expeditiously as practicable 13

IV

As a functional equivalent of an evironmental impact statement the implementation plan must also consider economic and technological factors 14

Conclusion 15

Table of Authorities Cited

Cases

	Pages
Appalachian Power Co. v. Environmental Pro. Agcy., 477 F.2d 495 (4th Cir. 1973)	2, 4, 5, 6, 9, 14
Buckeye Power, Inc. v. Environmental Pro. Agcy., 481 F.2d 162 (6th Cir. 1973)	6, 14
Calvert Cliffs' Coord. Com. v. United States A. E. Com'n, 449 F.2d 1109 (D.C. Cir. 1971)	14, 15
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1972)	8
Commonwealth of Pa. v. Environmental Protection Agcy., 500 F.2d 246, 250 (3d Cir. 1974)	8
Essex Chemical Corporation v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973)	10
Getty Oil Company (Eastern Operations) v. Ruckelshaus, 342 F. Supp. 1006 (D. Del. 1972)	8
Getty Oil Company (Eastern Operations) v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972)	9, 14
St. Joe Minerals Corp. v. Environmental Pro. Agcy., 508 F.2d 743 (3d Cir. 1975)	2, 13
State of Texas v. Environmental Pro. Agcy., 499 F.2d 289 (5th Cir. 1974)	12
Union Electric Co. v. Environmental Pro. Agcy., 515 F.2d 206 (8th Cir. 1975)	9, 12

Rules

	Pages
Supreme Court Rules:	
Rule 42	1

Statutes

	Pages
40 C.F.R.:	
Section 51.2 (1972)	4
5 U.S.C.:	
Section 706	7

42 U.S.C.:	Pages
Sections 1857, et seq. (1970)	3
Section 1857(b)	11
Section 1857c-3	3
Section 1857c-5	3
Section 1857c-5(a)(2)(A)	13
Section 1857c-5(e)	12
Section 1857g(a)	10
Section 1857h-5(b)(1)	2, 7
Sections 4321, et seq. (1970)	14

Texts

C. Starr, A Strategy for National Electricity Production (July 10, 1975)	9, 11

Other Authorities

Hearings, Senate Subcommittee on Air and Water Pollution, Committee on Public Works, 92nd Cong., 2d Sess., 230 and 236 (1972)	5

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UNION ELECTRIC COMPANY,
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Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

The Pacific Legal Foundation files this brief *amicus curiae* pursuant to Rule 42, having obtained the consent of Appellant Union Electric Company and Appellee Environmental Protection Agency.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for

the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the eighteen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation believes the action of the court below in refusing to consider technological and economic feasibility in a Section 307(b)(1) proceeding under the Clean Air Act will adversely affect the general welfare of the people of this nation. This ruling is squarely in conflict with that of the Fourth Circuit in *Appalachian Power Co. v. Environmental Pro. Agcy.*, 477 F.2d 495 (4th Cir. 1973), and that of the Third Circuit in *St. Joe Minerals Corp. v. Environmental Pro. Agcy.*, 508 F.2d 743 (3d Cir. 1975).

Pacific Legal Foundation considers this case to be extremely significant in that the lower court's decision cripples the ability of private industry to protect public health while also maintaining the ability to meet the public demand for goods and services. Unless this Court of Appeals decision is reversed, consequences will be severe, including forced shutdowns of affected businesses, exposing the country not only to shortages in goods and services, but to an escalation in consumer prices and unemployment.

Pacific Legal Foundation believes that the magnitude of this issue must be fully developed, and to insure this development submits this brief.

OPINION BELOW

The United States Court of Appeals, Eighth Circuit, in an opinion reported at 515 F.2d 206 (8th Cir. 1975) declared that economic and technological feasibility of compliance were not to be considered in evaluating a state implementation plan submitted pursuant to the Clean Air Act Amendments of 1970.

ARGUMENT

I

THE ADMINISTRATOR MUST CONSIDER ECONOMIC AND TECHNOLOGICAL FEASIBILITY OF COMPLIANCE AS RELEVANT FACTORS IN APPROVING OR DISAPPROVING A STATE IMPLEMENTATION PLAN

The Clean Air Act Amendments of 1970[1] required the Administrator of the Environmental Protection Agency (EPA) to prepare a list of all air pollutants which have an adverse effect on public health and welfare and to issue air quality criteria for these pollutants.[2] The Amendments also required the Administrator to promulgate national primary and secondary ambient air quality standards for each air pollutant for which air quality criteria had been issued. Pursuant to these standards, each state is to formulate an "implementation plan" establishing standards for the control within their borders of the sources of pollution.[3] Having adopted a particular mix of emission limitations as its implementation plan, the state

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[1] 42 U.S.C. § 1857, *et seq.* (1970).
[2] 42 U.S.C. § 1857c-3.
[3] 42 U.S.C. § 1857c-5.

must submit the plan to the Administrator. He is then to review it to determine if it meets certain criteria which determine the plan's adequacy. If the plan meets these criteria, the Administrator approves it. Otherwise, he resubmits it to the state for revision.

Among the criteria which must be considered by the Administrator are the economic and technological feasibility of the implementation plan. This was clearly stated by the Fourth Circuit Court of Appeals in *Appalachian Power Co. v. Environmental Pro. Agcy., supra.* In response to the assertion by the EPA that the Administrator need not review the economic or technological feasibility of the plan in exercising his power to approve or disapprove the state plan, the court stated:

> "We take no such narrow view of either our own role in connection with the judicial review of the Administrator's action or of the Administrator's role in evaluating the state plan in connection with his exercise of the power to approve or disapprove." *Id.* at 505.

This reasoning is fortified by the Administrator's own guidelines.[4] The guidelines state:

> "Nothing in this part shall be construed in any manner:
>
> . . . .
>
> "(b) To encourage a state to adopt any particular control strategy without taking into consideration the cost-effectiveness of such control

[4] 40 C.F.R. § 51.2 (1972).

> strategy in relation to that of alternative control strategies.
>
> . . . .
>
> "(d) To encourage a state to prepare, adopt, or submit a plan without taking into consideration the social and economic impact of the control strategy set forth in such plan, including, but not limited to, impact on availability of fuels, energy, transportation, and employment."

Ignoring factors which are set out in EPA's own guidelines as considerations upon which a state plan is to be developed is a clear abdication of the Administrator's duty under the Clean Air Act.

Further support of this argument is found in the very process by which the Administrator evaluates state plans upon submission. The Administrator has utilized an interagency review process, composed of representatives of the Federal Power Commission, the Office of Transportation, the Office of Management and Budget and others. An interagency review committee reviews the aggregate impact of implementation plans.[5] William Ruckelshaus indicated in his testimony before the 1972 Oversight Committee[6] that the interagency review process would be an invaluable asset in determining the availablity of fuels, transportation programs, and public and private sector investment. The Administrator considered this

[5] *Appalachian Power Co. v. Environmental Pro. Agcy.*, 477 F.2d 495, 506 (4th Cir. 1973).

[6] *See Hearings, Senate Subcommittee on Air and Water Pollution, Committee on Public Works,* 92nd Cong., 2d Sess., 230 and 236 (1972).

process so important that he allotted to it half of the time allowed him to approve or disapprove the plan. As was stated in *Appalachian Power Co. v. Environmental Pro. Agcy., supra* at 506:

> "It is inconceivable that these agencies, acting with the Administrator, in determining 'the aggregate impact' of the plans and 'in determining the availability of fuels, transportation programs, and public and private sector investment,' do not consider and evaluate the technological and economic aspects of the plans under review. Nor is such evaluation inappropriate under the Amendments."

If the interagency committee must evaluate economic and technological factors under the procedure established by the Administrator, the Administrator himself must also consider them. Indeed this evaluation is essential to the proper performance of his function under the Clean Air Act Amendments, as economics and technology are relevant factors for evaluation. The Sixth Circuit Court of Appeals undercut any other conclusion by saying in *Buckeye Power, Inc. v. Environmental Pro. Agcy.,* 481 F.2d 162 (6th Cir. 1973):

> "We find the Agency's argument that the technological feasibility, high cost-benefit, and resource unavailability are irrelevant under the 1970 Amendments, devoid of merit." *Id.* at 169.

To ignore the technological feasibility, the cost-benefit, and resource availability verges on the idiotic and absurd for it rejects reality and embraces wishful thinking. It does not advance, but rather, regresses society.

II

APPROVAL BY THE ADMINISTRATOR OF A STATE IMPLEMENTATION PLAN IS ARBITRARY AND CAPRICIOUS IF IT FAILS TO CONSIDER RELEVANT FACTORS—ECONOMIC AND TECHNOLOGICAL FEASIBILITY—AND IS THEREFORE A CLEAR ABUSE OF DISCRETION

Section 307(b)(1) of the Clean Air Act Amendments (42 U.S.C. § 1857h-5(b)(1))[7] provided for judicial review of an Administrator's action in approving or promulgating any implementation plan.

The standard of review applicable is set forth in Title 5, United States Code, Section 706:

> "The reviewing court shall—
>
> . . . .
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
>
> "(B) contrary to constitutional right, power, privilege, or immunity;

---

[7]Section 307(b)(1), Title 42, United States Code, Section 1857h-5(b)(1) (1970), provides that:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."

> "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ."

It is well established that the Administrator's approval of a state implementation plan will be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[8]

This Court, in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1972), explained that as part of this "inquiry" it:

> "[M]ust consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416.

Technological feasibility and economic feasibility are relevant factors for the Administrator's consideration. The court in *Getty Oil Company (Eastern Operations) v. Ruckelshaus,* 342 F. Supp. 1006, 1015 (D. Del. 1972), presumed that the review of the action of the Administrator in approving a state plan would inquire whether the plan was "unnecessary, uneconomic, and ill-suited to the accomplishments of the regulatory program," such inquiry being the measuring device to determine whether the approval was arbitrary and unreasonable. On appeal, this construction of the court's scope of review was accepted as authorizing judicial review on the grounds that the approval was "arbitrary and unreasonable" and that, in

[8] *Commonwealth of Pa. v. Environmental Protection Agcy.,* 500 F.2d 246, 250 (3d Cir. 1974).

considering such grounds, "questions of economic hardship or lack of compelling necessity" could be considered.[9] *Getty Oil Company (Eastern Operations) v. Ruckelshaus,* 467 F.2d 349, 355, 357 (3d Cir. 1972).

The Missouri Implementation Plan will clearly have devastating economic and social impact. Union Electric Company operates three coal-burning electric power plants in the St. Louis area. Sulfur dioxide is a by-product of burning the coal to generate electricity. The Missouri plan has promulgated such restrictive limitations for sulfur dioxide emissions that Union Electric is faced with the impossibility of compliance. Technologically the limitations cannot be met, and in the alternative the cost of installing particulate removal equipment such as Scrubbers is so high in relation to the benefits that the public interest would be adversely affected by their installation.[10]

The alternative is to shut down the plants. Such action will have far reaching adverse social and economic impact. It is well documented that electricity demand tracks unemployment levels closely.[11] Electricity shortages will force reductions in employment. Such constraint should be avoided as a national policy.

[9] *See also Appalachian Power Co. v. Environmental Pro. Agcy., supra.*

[10] *Union Electric Co. v. Environmental Pro. Agcy.,* 515 F.2d 206, 209 n.6 (8th Cir. 1975).

[11] C. Starr, *A Strategy for National Electricity Production* (July 10, 1975) [hereinafter cited as *Starr*].

Less restrictive limitations which would permit feasible controls would have the effect of balancing environmental protection with job protection and could still meet national standards. The plan therefore exceeds the scope of Title 42, United States Code, Section 1857g(a), which allows the Administrator only "to prescribe such regulations as are necessary." Regulations which would shut down three major electricity generating plants with the results being shutdown of industries dependent upon the electricity, business failure, economic recession and crippling unemployment are not necessary or reasonable. The approval of the implementation plan is an abuse of administrative discretion and in violation of the law. It must be struck down because it is not the result of "reasoned decision-making."[12]

III

APPROVAL OF AN IMPLEMENTATION PLAN WITHOUT CONSIDERING ECONOMIC AND TECHNOLOGICAL FEASIBILITY VIOLATES THE CLEAN AIR ACT

Approval of an implementation plan without considering economic and technological feasibility violates the Clean Air Act in that it:

1. Fails to promote the public welfare and the productive capacity of this nation;

2. Fails to consider the reasonable availability of control measures;

[12] *Essex Chemical Corporation v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

3. Fails to consider the feasibility of the implementation plan.

A

Failure to Promote Productive Capacity

The Missouri Implementation Plan subverts the very purpose of the Clean Air Act. The opening section of the Act states that one of its purposes is:

> "(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the *productive capacity of its population* . . . ." 42 U.S.C. § 1857(b) (emphasis added).

Obviously, regulations which force the shutdown of energy sources do not promote the productive capacity of the population. Indeed the converse is true.

Total energy consumption tends to roughly parallel Gross National Product (GNP). This relationship arises from the elemental fact that the combination of labor, capital equipment and energy creates goods and services.[13] Even food production is heavily dependent on energy input. GNP and energy use are thus closely linked.[14]

B

Failure to Specify "Reasonably Available" Control Measures

The regulations of the implementation plan further violate the Clean Air Act because they do not set

[13] *Starr* at 6.
[14] *Starr* at 2.

forth programs for achieving air pollution control standards which are "reasonably available." *See, e.g.,* 42 U.S.C. § 1857c-5(e).

They are not reasonably available first because the particulate removal equipment (Scrubbers) has not been technologically devised to operate successfully and satisfactorily.[15]

Secondly, even if the present technology were available, its cost is so disproportionate as to render such installation unreasonable, for under such circumstances control measures are not "reasonably available." This standard was affirmed in *State of Texas v. Environmental Pro. Agcy.,* 499 F.2d 289 (5th Cir. 1974), which held:

> "[T]he agency may not force a state to adopt measures needed during the 1975-1977 period merely because they are available, but only if they also are reasonable." *Id.* at 313.

In this instance, to install the presently available equipment would require a capital expenditure of over $500 million for all of Union Electric's plants. Such an expenditure on equipment not designed to promote productivity is economically unreasonable and cannot be rationally justified.

Given the edict to meet the promulgated emission limitations, Union Electric may have no choice but to close its doors. Such an event certainly would not be in the public interest.

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[15] *Union Electric Co. v. Environmental Pro. Agcy., supra* at 209 n.9.

C

Failure to Approve a Plan Which Will Achieve National Primary Ambient Air Quality Standards As Expeditiously As Practicable

The Clean Air Act itself required the EPA Administrator to review the feasibility of an implementation plan. The Administrator is directed to determine whether an implementation plan provides for the attainment of primary ambient air quality standards "as expeditiously as *practicable*"[16] (emphasis added). The Third Circuit, in *St. Joe Minerals v. Environmental Pro. Agcy.,* 508 F.2d 743 (3d Cir. 1975), reasoned that:

> "These temporal qualifications suggest that in considering an implementation plan the Administrator should evaluate the workability of the proposed limitations." *Id.* at 748.

A plan which cannot be met because of technological infeasibility and prohibitive cost is certainly not practicable nor is it workable. If standards cannot be met under the current mix due to technological and economic infeasibility, the national ambient air quality standards cannot be met as expeditiously as practicable. To promulgate such a plan regardless of these known facts violates the basic tenets of the Clean Air Act and cannot stand.

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[16] 42 U.S.C. § 1857c-5(a)(2)(A).

IV

AS A FUNCTIONAL EQUIVALENT OF AN ENVIRONMENTAL IMPACT STATEMENT THE IMPLEMENTATION PLAN MUST ALSO CONSIDER ECONOMIC AND TECHNOLOGICAL FACTORS

A number of cases[17] have argued that the Administrator in approving a state implementation plan must file an Environmental Impact Statement pursuant to the dictate of the National Environmental Policy Act of 1969 (NEPA).[18] The courts have consistently held that the EPA need not file an Environmental Impact Statement because sufficient provisions are contained within the Clean Air Act to achieve the goals sought to be achieved by NEPA.

It is well settled that the purpose of NEPA is to insure that in a major federal project, consideration is not only given to the economic and social ramifications of the project but also to the environmental ramifications.

It must be emphasized that the purpose of NEPA is not to exalt the environment over equally important economic and social considerations. As Judge Wright stated in *Calvert Cliffs' Coord. Com. v. United States A. E. Com'n,* 449 F.2d 1109 (D.C. Cir. 1971):

> "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place

[17] *See Appalachian Power Co. v. Environmental Pro. Agcy., supra; Buckeye Power, Inc. v. Environmental Pro. Agcy.,* 481 F.2d 162 (6th Cir. 1973); *Getty Oil Company (Eastern Operations) v. Ruckelshaus,* 467 F.2d 349 (3rd Cir. 1972).

[18] 42 U.S.C. § 4321, *et seq.* (1970).

> along with *other considerations. . . .*" *Id.* at 1112 (emphasis added).

The Administrator can meet the goals of NEPA only if he considers economic, technological, and social factors in a state implementation plan. As was stated above, the purpose of NEPA is to insure a balanced approach to agency level decision-making. The Administrator has failed to meet this mandate by his refusal to consider the economic and technological feasibility of provisions within a state implementation plan. He has asserted that he has authority to only approve the plan if its provisions satisfy the national primary and secondary ambient air quality standards. Such a position can only be described as unreasonable and in contravention of the spirit of NEPA. If the provisions of the Clean Air Act satisfy NEPA as a functional equivalent as the courts have heretofore concluded, it is clear that the Clean Air Act assumes that economic and technological considerations will be balanced by the Administrator with environmental considerations. Anything less subverts the intent of NEPA and must be struck down.

CONCLUSION

The implementation plans which are promulgated pursuant to the Clean Air Act play a major role not only in the protection of public health but also in the protection of public welfare and economic progress. The Administrator of the Environmental Protection

Agency does not recognize this scope of implementation plans, asserting that economic and technological feasibility of the plans are not considerations upon which he may legally approve or disapprove such plans. We contend that not only does the Administrator have the legal authority to consider these factors, but he has the duty to consider these factors and approve or disapprove plans weighing this evidence.

The electric power industry has the responsibility to provide an adequate and reliable source of energy to millions of people totally dependent upon it for power supply both for their homes and their jobs, as well as a responsibility to protect the public health. This public trust can be met only if the Administrator balances economic and technological considerations with environmental considerations, and then acts to approve or disapprove the implementation plan. The Pacific Legal Foundation, as *amicus curiae,* therefore urges the decision of the Court of Appeals to be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Court Below Misconceived the Role of the Court of Appeals Under Section 307(b)(1) When It Is Reviewing the Administrator's Approval of an Implementation Plan	5
II. Under Section 110(a)(2)(A) the Administrator Must Take Into Account Technological and Economic Factors in Order To Determine Whether a State Implementation Plan Will Provide for Attainment of the Primary Standard as Expeditiously as Practicable and for Attainment of a Secondary Standard Within a Reasonable Time	12
A. The Practicability and Reasonableness of the Time for Attainment of the Standards	13
B. The Effectiveness of the Plans To Attain the Standards	16
III. Under Section 110(a)(2)(B) the Administrator Must Take Into Account Technological and Economic Factors in Order To Determine Whether a State Implementation Plan Includes Emission Limitations and Other Measures as May Be Necessary To Insure Attainment and Maintenance of the Primary and Secondary Standards	21
A. Judicial Consideration of Section 110(a)(2)	23
B. The Legislative History of Section 110(a)(2)	26
IV. Under Section 116 of the Act Standards More Stringent Than Necessary Are Outside an Implementation Plan	33

Page

V. Where the Courts of Appeals Have Held That Review of the Administrator's Failure To Consider Economic and Technological Factors Was Premature, the Parties To Those Proceedings May Subsequently Raise Issues Relevant To Those Factors in the Course of Enforcement Proceedings 38

CONCLUSION 44

TABLE OF AUTHORITIES

CASES:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).. 41
Accardi v. Shaughnessy, 347 U.S. 260 (1954) 15
Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973) 18, 24, 38
Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973) 39, 40, 41
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 9, 11, 12, 43
City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972) 7
Consolo v. FMC, 383 U.S. 607 (1966) 10
District of Columbia v. Train, 521 F.2d 971 (D.C. Cir., 1975) 25
Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) 7
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971) 7
Indiana & Michigan Electric Co. v. EPA, 509 F.2d 839 (7th Cir. 1975) 39, 40, 41
International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) 6
Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) 7
NLRB v. United Brotherhood of Carpenters, 261 F.2d 166 (7th Cir. 1958) 15

Page

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Reichhold Chemicals v. EPA, 8 ERC 1207 (7th Cir. 1975) 42
St. Joe Minerals Corp. v. EPA, 508 F.2d 743 (3d Cir. 1975) 14, 15, 23, 38
Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) 15
Service v. Dulles, 354 U.S. 363 (1957) 15
South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) 24, 25
Train v. NRDC, 421 U.S. 60 (1975) 2, 17, 18
Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir. 1975) 3, 4, 6, 9, 23, 26, 32, 34, 39
United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) 12
United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973) 11
United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) 15
United States v. Midwest Video Corp., 406 U.S. 649 (1972) 12
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 10
Vitarelli v. Seaton, 359 U.S. 535 (1959) 15

STATUTORY PROVISIONS:

Administrative Procedure Act
5 U.S.C. § 551(4) (1970) 10
5 U.S.C. § 553 (1970) 10, 11, 12, 43
5 U.S.C. §§ 556, 557 (1970) 11, 12
5 U.S.C. § 559 (1970) 10
5 U.S.C. § 703 (1970) 39, 40
5 U.S.C. § 706(2)(A) (1970) 9
5 U.S.C. § 706(2)(E) (1970) 10, 11

Page

Clean Air Act, As Amended
42 U.S.C. § 1857c-2(a) (1970) 27
42 U.S.C. § 1857c-4(a)(1) (1970) 3, 27
42 U.S.C. § 1857c-5 (1970) 5, 13, 14, 28, 29, 30, 32, 36, 37, 38
42 U.S.C. § 1857c-5(a)(1) (1970) 12, 27
42 U.S.C. § 1857c-5(a)(2) (1970) ..... *passim*
42 U.S.C. § 1857c-5(a)(2)(A) (1970) ....3-27, *passim*
42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970) 30
42 U.S.C. § 1857c-5(a)(2)(B) (1970) ....3-33, *passim*
42 U.S.C. § 1857c-5(a)(3) (1970) 2
42 U.S.C. § 1857c-5(c)(1) (1970) 24
42 U.S.C. § 1857c-5(d) (1970) 3
42 U.S.C. § 1857c-8 (1970) 3, 42
42 U.S.C. § 1857d-1 (1970) 33, 35-38
42 U.S.C. § 1857h-2 (1970) 41
42 U.S.C. § 1857h-5 (1970) 7, 9, 41
42 U.S.C. § 1857h-5(b) (1970) 4, 5-7, 41
42 U.S.C. § 1857h-5(b)(1) (1970) 5, 6, 16, 20, 40, 41
42 U.S.C. § 1857h-5(b)(2) (1970) 40, 41
42 U.S.C. § 1857i(a) (1970) 10

Regulations:

36 Fed. Reg. 15486-15506 (1971) 15
37 Fed. Reg. 10842-10846 (1972) 10, 19, 20
40 C.F.R. Part 51 (1975) 15
40 C.F.R. §§ 51.1(o), 51.13(b)(2) (1975) 16

Legislative Material:

A Legislative History of the Clean Air Amendments of 1970, Prepared for the Senate Comm. on Public Works by the Congressional Research Service, Serial No. 93-18, 93d Cong., 2d Sess. (1974) .. *passim*
H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946) ... 11
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116 Cong. Rec. S20600 (1970) 14
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Page

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---

BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

INTEREST OF AMICI CURIAE

Amici submit this brief in support of the petitioner Union Electric Company. Both petitioner Union Electric Company and respondent Environmental Protection Agency (EPA) have consented to the filing of this brief amici curiae by letters which have been presented to the Clerk of the Court pursuant to Rule 42(2).

Appalachian Power Company, Indiana & Michigan Electric Company, Kentucky Power Company, and Ohio Power Company are each a part of the American Electric Power System, the largest privately-owned electric power system in the United States. Each of these companies was a party in one or more of the cases in the Fourth, Sixth and Seventh Circuits in which the courts held, contrary to the holding of the court of appeals below, that technological and economic factors must be considered by EPA in the approval or enforcement of implementation plans under the Clean Air Act, and that EPA's action thereon is subject to judicial review in federal courts. The decision of the Court in this case will thus have far reaching impact upon amici, and upon the extent to which they will be able to satisfy their obligation to make available within their service areas an adequate supply of electric power to the public at reasonable cost.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its leading decision interpreting the Clean Air Act, *Train* v. *NRDC,* 421 U.S. 60 (1975), this Court held that EPA is required to approve, as a revision to a state implementation plan under Section 110(a) (3), a variance which does not interfere with Congressional goals of attaining and maintaining the national ambient air quality standards. The focus of the present case is at an earlier stage of the administrative scheme —the approval of the state implementation plan itself by the Administrator of EPA.

The Clean Air Act, 42 U.S.C. §§ 1857 *et seq.,* as amended in 1970, directs EPA to promulgate national primary and secondary standards designed to protect

against adverse effects on public health and welfare.[1] After these standards are established, each state submits to EPA a plan providing for the implementation, maintenance and enforcement of the standards within the state. The Act provides that the Administrator shall approve the plan if he determines that it satisfies the criteria enumerated in Section 110(a)(2) of the Act,[2] two of which are significant in this case. One requires the plan to provide for attainment of the primary standards "as expeditiously as practicable" but in any event no later than three years from the date of approval, and for attainment of the secondary standards within "a reasonable time."[3] The other requires the plan to contain "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance" of the standards.[4] It is the position of amici that the Administrator may and must consider economic and technological factors in making his determinations under the foregoing statutory provisions.

In its decision below[5] the Eighth Circuit dismissed on two separate but related grounds the Union Electric Company's petition for review of certain provisions of the Missouri implementation plan as approved

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[1] 42 U.S.C. § 1857c-4(a)(1) (1970).

[2] 42 U.S.C. § 1857c-5(a)(2) (1970). Once a plan is approved, it is subject to state and federal enforcement. 42 U.S.C. § 1857c-8 (1970). *See also* 42 U.S.C. § 1857c-5(d) (1970).

[3] 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

[4] 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

[5] Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir. 1975).

by the Administrator. First, it held that economic and technological factors may not enter into the Administrator's consideration of whether to approve a state implementation plan, and accordingly that such factors do not afford a basis for judicial review of such approval under Section 307(b) of the Act. Second, it held that a petition for review filed more than 30 days after EPA approval, based upon new information which arose more than 30 days after such approval, is proper only when such information has first been presented to the Administrator and the Administrator has failed to act.[6]

In this brief amici will not address the second issue of how and under what circumstances a petition for review may be filed more than 30 days after the Administrator has approved a state implementation plan. Instead, we will focus solely on whether the Eighth Circuit was correct in holding that "Congress intended to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan,"[7] and that "economic and technological considerations do not afford a basis for . . . review under section 307(b)."[8]

Amici will show that this determination by the court of appeals below cannot be supported by the language of the Act or by its legislative history, and that every other court of appeals that has considered the question has recognized the relevance of technological and

[6] Both of these issues are encompassed in Question 1 to which this Court's grant of the petition for a writ of certiorari was limited.

[7] 515 F.2d at 215.

[8] 515 F.2d at 219.

economic factors. Amici will also show that the Clean Air Act requires that these factors be considered:

(1) in determining whether a plan will assure attainment of primary standards as expeditiously as practicable, or of secondary standards within a reasonable time;

(2) where failure to consider and account for such factors would interfere with attainment and maintenance of the standards; and, most importantly,

(3) where the plan is more stringent than necessary to insure attainment of the standards.

ARGUMENT

I. The Court Below Misconceived the Role of the Court of Appeals Under Section 307(b)(1) When It Is Reviewing the Administrator's Approval of an Implementation Plan.

Fundamental to the decision of the court of appeals below was its approach to the role of the court upon review of the Administrator's approval of implementation plans under Section 110 of the Act. The court's conclusion that economic and technological considerations do not afford a basis for judicial review under Sectin 307(b)[9] was based in part upon its interpretation of the Administrator's authority in reviewing and approving state plans under Section 110. Equally important, however, was the court's determination that under Section 307(b) the courts have only a very limited role in reviewing determinations of the Administrator. The court noted that even if technological and economic factors were to be considered by the Administrator in his consideration of whether to ap-

[9] 42 U.S.C. § 1857h-5(b) (1970).

prove an implementation plan, such factors could not be considered on judicial review of his approval:

> "the mandatory and directory language of section 110(a)(2) would preclude using such grounds as a basis for setting aside his action on a petition for review under section 307(b)(1)." 515 F.2d at 216.

At another point the court stated:

> "While the considerations Petitioner asserts in its petition for review are important ones needing resolution, they are not appropriate for judicial resolution but are essentially legislative judgments as to where the public interest lies. Whether the public interest would be best served by closing plants or by allowing some variances from the national program for clean air we cannot say. This is, of course, a current concern of Petitioner as well of almost all citizens in this country. However, the statement of this concern does not thereby render it into one capable of judicial resolution.
>
> "This is in essence a political question." 515 F.2d at 219.

These conclusions by the Eighth Circuit are contrary to accepted standards of judicial review, and to the intent of Congress that the courts of appeals exercise a special role in their review of the Administrator's decisions under the Clean Air Act. In *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 647-48 (D.C. Cir. 1973), the court emphasized that "a court's role on judicial review embraces that of a constructive cooperation with the agency involved in furtherance of the public interest," and requires the reviewing court to review evidence even on "technical and specialized matters," to "penetrate the underlying

decisions of the agency," and to satisfy itself that the Administrator "meet[s] the burden of proof which . . . [is] properly assignable to him." Recognizing that environmental litigation represents a "new era" in administrative law, the courts have required that the agency provide "a framework for principled decision-making,"[10] and that "reasoned conclusions" from the "whole record" be made.[11] A reviewing "court exercises this aspect of its supervisory role with particular vigilance if it 'becomes aware, especially from a combination of danger signals, that the agency has not really taken a "*hard look*" at the salient problems, and has not genuinely engaged in reasoned decision-making.' "[12]

As Judge Leventhal noted in *Kennecott Copper Corp.* v. *EPA,* 462 F.2d 846, 848 (D.C. Cir. 1972), the courts of appeals have been "assigned special responsibility" for reviewing cases involving challenges to EPA action. This special responsibility derives from the statutory role entrusted to the courts by Congress under Section 307(b) of the Clean Air Act. The legislative history of the Act is unmistakeable on this point.

As the bill passed the House there was no counterpart of Section 307 providing for statutory judicial review of administrative decisions. The Senate added

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[10] Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971).

[11] City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972).

[12] Leventhal, H., "Environmental Decisionmaking and the Role of the Courts," 122 U. Pa. L. Rev. 509, 511 (1974), *quoting* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

a statutory judicial review provision, but it provided that "[a]ny determination or finding of the Secretary, subject to challenge under this subsection, shall be presumed correct."[13]

The Senate and House Conferees retained the statutory review provisions of the Senate bill, but they explicitly rejected the limited scope of review contained in that bill by eliminating the presumption of correctness. The Conference Report provides no elaboration on this elimination of the presumption, but in discussing the Conference substitute on the Senate floor Senator Cooper took special pains to emphasize the important role of the courts in judicial review of administrative actions under the Act:

> "It would be difficult to single out any provision in this bill for special attention. I think it represents a firm application of pollution control procedures, while at the same time being just and incorporating throughout, due process and fairness. The bill provides many procedural protections and *involves the judicial branch of Government to a degree never before attempted in programs to achieve environmental quality.*"[14]

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[13] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 125 (1970) (hereinafter "S. Rep."). In spite of this presumption of correctness, the Senate Committee made clear that the administrative decisions were not to be deemed "conclusive" and that the presumption was rebuttable upon a showing that the administrative decision "is not supported by a preponderance of its evidence." *Id.* at 41.

[14] A Legislative History of the Clean Air Amendments of 1970, Prepared for the Senate Comm. on Public Works by the Congressional Research Service, Serial No. 93-18, 93d Cong., 2d Sess. (hereinafter "Legis. Hist."), at 149; 116 Cong. Rec. S20610 (1970) (emphasis added).

As finally enacted, Section 307 provided for judicial review without the provision that administrative determinations were presumed to be correct.[15]

These expressions of Congressional intent as to the role of the courts in judicial review of administrative action under the Clean Air Act are totally at odds with the Eighth Circuit's concept of limited judicial involvement. Congress fully recognized that administrative determinations under the Clean Air Act would have far reaching economic and social effects, and that such determinations must be subject to judicial review "to a degree never before attempted in programs to achieve environmental quality."[16] The Eighth Circuit's attempt to write the courts out of any significant role in the supervision of the administration of the Clean Air Act is unsupportable in the light of the unambiguous Congressional intent.

There is another respect in which the Eighth Circuit appears to have misconceived the role of the court. In describing the scope of review of the Administrator's action, the court stated that "review is limited to determining whether the Administrator's decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' ", citing 5 U.S.C. § 706(2)(A), and this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). 515 F.2d at 214.

The Eighth Circuit's decision in this regard reflects a departure from this Court's previous decisions, and a confusion as to the proper scope of review of agency rulemaking which should be clarified by this Court.

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[15] Legis. Hist. at 185, 207; H.R. Rep. No. 91-1793, 91st Cong., 2d Sess. 35, 57 (1970) (hereinafter "Conf. Rep.").

[16] Legis. Hist. at 149; 116 Cong. Rec. S20610 (1970).

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, recognizes that administrative decision-making may take the form of adjudication, formal rulemaking, informal rulemaking, or nonformalized decision-making. It is quite clear that the Administrator's action in approving state plans is rulemaking within the meaning of the APA, and it therefore follows that the substantial evidence test should be applied.

A rule is defined by the APA as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4) (1970). The Administrator's approval clearly falls within this definition. In fact, the Administrator himself described his action in approving state plans as rulemaking. *See* 37 Fed. Reg. 10842, 10846 (1972). Since the APA is applicable unless specifically excepted by statute, 5 U.S.C. § 559 (1970), and since the Clean Air Act does not expressly exempt agency action from the APA,[17] the Administrator's approval constitutes informal rulemaking subject to all the procedural safeguards set out in Section 4 of the APA, 5 U.S.C. § 553 (1970).

The formal determinations made by the Administrator in deciding to approve a state plan must be reviewed under the substantial evidence test.[18] Section 10(E) of the Administrative Procedure Act, which sets forth the scope of review for a court reviewing agency action, provides in pertinent part:

[17] Indeed, Section 310(a) of the Clean Air Act expressly states that the Act does not supercede other statutory provisions. 42 U.S.C. § 1857i(a) (1970).

[18] *See generally,* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Consolo v. FMC, 383 U.S. 607, 620 (1966).

"The reviewing court shall—

* * *

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . ." 5 U.S.C. § 706 (1970).

Although it is readily apparent that the Administrator's action is not subject to Sections 556 and 557, which apply to formal adjudication and formal rulemaking, the "or otherwise" clause is clearly applicable since only informal rulemaking also produces a "record" for review.[19]

The conclusion that substantial evidence is the appropriate standard of review in informal rulemaking proceedings is underscored by this Court's opinion in *Overton Park, supra.* In that case the Court held that the arbitrary and capricious test applies to nonformalized decision-making in which the agency is not required to allow for public participation and there is no "record that is to be the basis of agency action. . . ." However, the Court went on to state that "[r]eview

[19] The House Report on the bill which became the APA shows that Section 553 informal rulemaking produces a "record." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946); *see* Note, Judicial Review of the Facts in Informal Rule-making: A Proposed Standard, 84 Yale L.J. 1750 (1975). In addition, this Court has indicated that the informal notice-and-comment rulemaking procedures of the APA constitute a "hearing" within the meaning of the rulemaking section of the APA. United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). Since the APA requires notice and comment in connection with informal rulemaking, there is an "agency hearing provided by statute" within the meaning of Section 706(2)(E).

under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. § 553 . . ., or when the agency action is based on a public adjudicatory hearing. *See* 5 U.S.C. §§ 556, 557. . . ." 401 U.S. at 414. This Court has applied the substantial evidence test in other cases where the notice and comment provisions of Section 553 were followed.[20]

As we have shown above, the legislative history of the Act demonstrates Congress' intent that the reviewing courts be involved to a substantial degree. The role of the court and scope of review posited by the Eighth Circuit is unduly narrow and inconsistent with both Congressional intent in enacting the Clean Air Act and the requirements of the APA.

II. Under Section 110(a)(2)(A) the Administrator Must Take Into Account Technological and Economic Factors in Order to Determine Whether a State Implementation Plan Will Provide for Attainment of the Primary Standard as Expeditiously as Practicable and for Attainment of a Secondary Standard Within a Reasonable Time.

Section 110(a)(1) of the Act provides that each state shall adopt and submit to the Administrator a plan which provides for implementation, maintenance and enforcement of the primary and secondary ambient air quality standards promulgated pursuant to Section 109. Once a state plan has been submitted to the Administrator, he must approve the plan if he determines that it was adopted after reasonable notice and hear-

[20] *See* United States v. Midwest Video Corp., 406 U.S. 649, 671, 673 (1972) (plurality opinion of Brennan, J.); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 746, 753 (1972).

ing and if it meets the specific requirements set forth in Section 110(a)(2). The first requirement for such a plan—set forth in Section 110(a)(2)(A)—is that it provide for the attainment of the national primary air quality standard "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . .", and that the plan specify a "reasonable time" for attainment of the relevant national secondary ambient air quality standard. 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

In the Administrator's determination of whether a state plan meets these requirements of Section 110(a)(2)(A), technological and economic factors are relevant in at least two respects:

(A) The "practicability" of expeditious attainment of a primary standard and the "reasonableness" of the time for attainment of a secondary standard will depend in large part upon the cost and availability of technology for compliance with the emission limitations and other controls in the implementation plan.

(B) The capability of an implementation plan to assure timely attainment of the standards may well turn on whether the necessary fuels and technology for compliance with the plan are or will be available within the specified time.

A. THE PRACTICABILITY AND REASONABLENESS OF THE TIME FOR ATTAINMENT OF THE STANDARDS.

The practicability test with regard to the primary standard and the reasonableness test with regard to the secondary standard are not further elaborated upon in Section 110, or elsewhere in the Act. It would seem to be clear, however, that if an implementation plan required compliance immediately, or well in advance of

the three-year outside date specified in Section 110(a)(2)(A), a person affected by the standard should be permitted to submit evidence as to whether such early compliance is feasible from the standpoint of available technology or the costs of such prompt compliance. Similarly, the question of whether an implementation plan provides for attainment of a secondary standard within a "reasonable time" would appear to turn on such questions as the availability of technology, and the costs of installing the technology necessary for compliance within the time specified.

This interpretation of Section 110(a)(2) is reflected in the legislative history of the 1970 Amendments. For example, the summary of the conference agreement introduced by Senator Muskie in its discussion of Section 110 states that provisions of a state plan designed to meet the secondary standards within a reasonable time "should be *related to the difficulties* with which a particular region is confronted." [21]

The concept of reasonableness and practicable attainment of the standards has also been addressed by the courts. In *St. Joe Minerals Corp.* v. *EPA*, 508 F.2d 743, 748 (3d Cir. 1975), for example, the Third Circuit reasoned that considerations of practicability and reasonableness in Section 110(a)(2)(A) require that EPA review the feasibility of a state plan:

> ". . . Congress would have made its purpose more explicit if it had intended by section 110(a)(2) to limit the Administrator's authority so as to require him to effectuate an implementation plan even though compliance with such plan is technologically infeasible and the constraints in the plan have not been shown to be essential to the accomplishment of the national standards.
>
> "A review by the EPA of the feasibility of an implementation plan is not inconsistent with the statutory language. The Administrator is directed to determine whether an implementation plan provides for the attainment of primary ambient air quality standards 'as expeditiously as *practicable*' and secondary standards within 'a reasonable time.' These temporal qualifications suggest that in considering an implementatation plan the Administrator should evaluate the workability of the proposed limitations." 508 F.2d at 748 (footnotes omitted).

[21] Legis. Hist. at 132; 116 Cong. Rec. S20600 (1970) (emphasis added).

In fact, the Administrator himself has recognized the clear relevance of economic and technological factors under Section 110(a)(2)(A) of the Act in regulations establishing requirements for the preparation and submission of implementation plans.[22] The agency's regulations require the attainment and maintenance of secondary standards for sulfur oxides to be achieved through the application of *"reasonably available control technology"* and where such technology will not be sufficient, the time required for attainment shall depend, *inter alia,* "on the social, *economic,* and *techno-*

[22] 40 C.F.R. Part 51. These regulations were first published on August 14, 1971, 36 Fed. Reg. 15486-15506 (1971). They are, of course, binding on the Administrator. *See* Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954); Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Service v. Dulles, 354 U.S. 363, 372 (1957); NLRB v. United Brotherhood of Carpenters, 261 F.2d 166, 170 (7th Cir. 1958); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959); Pacific Molasses Co. v. FTC, 356 F.2d 386, 390 (5th Cir. 1966); and United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969).

logical problems involved in carrying out a control strategy adequate for attainment and maintenance of such secondary standard."[23] "Reasonably available control technology" is defined as "devices, systems, process modifications, or other apparatus or techniques, the application of which will *permit attainment* of the emission limitations set forth in Appendix B to this part . . . ."[24]

If under these regulations a state is required to consider such technological and economic factors in specifying times for compliance with the provisions of its plan and attainment of the standards, then it should be just as clear that the Administrator is required to review the action of the state in this regard and approve that aspect of the plan "if he determines" that the requirements of Section 110(a)(2)(A) have been met. In making that determination he must necessarily take into account the technological and economic factors considered by the state and upon which its decision was made. It is precisely that determination of the Administrator under Section 110(a)(2) in approving a state implementation plan that is reviewable under Section 307(b)(1).

B. THE EFFECTIVENESS OF THE PLANS TO ATTAIN THE STANDARDS.

The requirement of Section 110(a)(2)(A) that a state plan provide for attainment of primary standards as expeditiously as practicable, but in no case later than three years from the date of approval of the plan, and the related requirement of Section 110(a)(2)(B) that

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[23] 40 C.F.R. § 51.13(b)(2) (1975) (emphasis added).

[24] 40 C.F.R. § 51.1(o) (1975) (emphasis added). Appendix B of Part 51 sets forth EPA's conclusions as to emission limits achievable using reasonably available technology.

the plan include such emission limitations and other controls as may be necessary to insure attainment of the standard, impose an obligation on the Administrator to review the provisions of a state plan in order to satisfy himself that adequate and effective pollution abatement equipment will be available so that the affected sources within the state will be able to comply within the specified time. Suppose, for example, that in allocating needed reductions in sulfur dioxide emissions a state imposed the principal burden for attaining those reductions on one industry—say electric power plants—and imposed correspondingly lax limitations on other sulfur dioxide sources in the state. If the Administrator determined, on the basis of data and information before him, that the electric power plants within the state would not be able to achieve the prescribed reduction within the specified time because of the unavailability of either the necessary pollution abatement equipment or low sulfur fuels, then under the terms of Section 110(a)(2)(A) and (B) it would appear that the Administrator is required to disapprove the plan and to inform the state that a different mix of emission limitations is necessary if the standard in question is to be attained.

This Court made clear in its opinion in *Train* v. *NRDC*, 421 U.S. 60, 79 (1975), that under Section 110(a)(2) the states are given broad discretion to decide how the burden of attaining the standard should be borne among the various sources and classes of sources within the state:

> "Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission

limitations it deems best suited to its particular situation."

In short, Congress "left to the States considerable latitude in determining specifically *how the standards would be met.*" [25]

But this broad discretion in the states to decide upon the mix of emission limitations and controls for attainment of a standard is of course subject to the basic requirement that the controls selected by the state in fact achieve attainment of the standard within the time required. Accordingly, the Administrator must make a determination as to the achievability of the particular limitations selected by the state in its implementation plan, in the light of all relevant factors, including technological and economic considerations. This obligation of the Administrator was recognized by the Fourth Circuit in *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 506 (4th Cir. 1973), in rejecting EPA's argument that economic and technological factors are not relevant in the review of state plans:

> "After all, the Administrator's responsibility is to determine whether the proposed plan is practical and reasonably likely to achieve the results required under the Amendments; and, if he finds it reasonably unlikely to achieve such results within the fixed time-tables, whether for technological or economic reasons, or otherwise, he should reject the plan and return it to the state authorities with instructions to consider alternative procedures that might meet the statutory requirements as established by the Administrator."

[25] 421 U.S. at 87 (emphasis added).

There is another respect in which technological and economic factors may be relevant to the Administrator's determination of whether a state implementation plan will provide for timely attainment of the national standards. In the preamble to the May 31, 1972, notice of approval of the initial state implementation plans, the Administrator stated:

> ". . . in addition to reviewing the effectiveness of each State implementation plan, *this Agency and the Federal Government have an obligation to assess the impact of the various plans in the aggregate.* From this standpoint, there is strong evidence that the complete implementation of the plans as submitted may not be attainable in the time prescribed." [26]

Part of the evidence referred to was the lack of adequate supplies of "clean" fuels:

> "Because of physical limitations on our ability to clean the emissions of high sulfur fuels on a large scale in the time permitted by the statute, achievement of the particulars of the State plans would require the availability of large additional supplies of 'clean' fuels—natural gas and low sulfur coal and oil. . . . Unfortunately, these naturally clean fuels are not likely to be available in quantities necessary to meet the projected demand." [27]

The preamble went on to state:

> "Preliminary analysis by EPA indicates the real possibility that, under current conditions in the domestic and world fuel markets including the absence of the sulfur tax all aspects of the State

[26] 36 Fed. Reg. 10843 (1972) (emphasis added).
[27] *Id.*

> Plans *in the aggregate* cannot be achieved by 1975 despite the best efforts of both government and the private sector." [28]

The Administrator thus recognized that state plans must be considered not only on an individual basis in determining whether the requirements of Section 110 (a)(2)(A) and (B) will be met, but also that the state plans must necessarily be considered as they relate to one another and in the aggregate. Although a state may indeed have great latitude in adopting whatever mix of emission limitations it deems best suited to its particular situation, the Administrator would be obligated to disapprove the provisions of a state plan if he determined that they would result in unreasonable and unnecessary demands upon available technology or limited supplies of clean fuels, and thereby jeopardize the attainment of the standards in other states.

These and related questions clearly call for an evaluation of technological and economic factors by the Administrator in his appraisal of the inter-related and aggregate impact of state implementation plans, and for consideration of such factors in judicial review of any determinations he makes with respect to his approval of such plans. In short, the Administrator can determine whether a state plan meets the requirements of Section 110(a)(2)(A) and (B) only if he takes into account technological and economic factors. Under the provisions of Section 307(b)(1) his consideration of such factors and his determination thereon are subject to judicial review in the court of appeals.

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[28] 37 Fed. Reg. 10844 (1972).

III. Under Section 110(a)(2)(B) the Administrator Must Take Into Account Technological and Economic Factors in Order to Determine Whether a State Implementation Plan Includes Emission Limitations and Other Measures as May Be Necessary to Insure Attainment and Maintenance of the Primary and Secondary Standards.

In the previous sections we have shown that the Act requires that the Administrator take into account technological and economic factors in determining whether a state implementation plan is consistent with the requirements of Section 110(a)(2)(A) that plans provide for attainment of the national primary ambient air quality standard as expeditiously as practicable, and for attainment of the national secondary air quality standard within a reasonable time. Of equal or greater significance to the question of the relevance of technological and economic factors in the Administrator's review of a state implementation plan is the requirement in Section 110(a)(2)(B) that the Administrator must determine whether a plan:

> "includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls . . . ." [29]

As we have seen, Section 110(a)(2)(A) contains the basic requirement that a state plan must provide for attainment of the ambient air quality standards. Subparagraph (B) makes it clear that the state is not left complete discretion as to how its plan may assure attainment, by requiring that a state plan include emis-

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[29] 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

sion limitations, schedules and such other measures "as may be *necessary* to insure attainment" of the standards.

In one sense the "as may be necessary to insure attainment" language restates the requirement of subparagraph (A) that the provisions of the plan must be such as to insure attainment of the standards. But this aspect of subparagraph (B) would be totally redundant if it did nothing more than state that plan provisions must assure attainment of the standards. Both logic and common sense would suggest that subparagraph (B) was intended to impose some additional requirement, and the statutory language supports this conclusion, for the word "necessary" includes the connotation that a state implementation plan may not be approved by the Administrator if it contains emission limitations or other controls that are not required to insure attainment of the standards. In short, if a particular emission limitation or other control could be shown to be overly restrictive and thus not necessary to assure attainment, then it would not fall within the precise wording of Section 110(a)(2)(B).

Under this analysis, technological and economic factors are significant in the Administrator's determination of whether a state implementation plan meets the requirements of Section 110(a)(2)(B). If a particular plan sought to impose controls that were more stringent than necessary to assure attainment of the standard, and if such controls could be shown to impose excessive costs on particular sources, or to require sources to close because of the unavailability of technology, then the Administrator would be required to conclude that the provisions in question were arbitrary and unlawful, and thus subject to disapproval.[30] This interpretation of Section 110(a)(2) is supported both by well-reasoned judicial analysis and the legislative history of the statutory provisions.

A. JUDICIAL CONSIDERATION OF SECTION 110(a)(2).

At least three courts of appeals have held—contrary to the Eighth Circuit—that technological and economic factors are relevant to the consideration of an implementation plan under Section 110(a)(2), where the provisions in question have not been shown to be necessary for attainment of the national standards. In *St. Joe Minerals Corp.* v. *EPA,* 508 F.2d 743, 748 (3d Cir. 1975), the Third Circuit concluded that "the Act does not expressly empower the agency to disapprove a plan where restrictions are too narrow to be practicable," but it went on to hold:

> "Certainly, however, Congress would have made its purpose more explicit if it had intended by section 110(a)(2) to limit the Administrator's authority so as to require him to effectuate an implementation plan *even though compliance with such plan is technologically infeasible and the constraints in the plan have not been shown to be essential to the accomplishment of the national standards.*" (Emphasis added).

Although the court did not specifically refer to the "as may be necessary" language of Section 110(a)(2)(B),

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[30] The grounds in the petition for review filed with the Eighth Circuit below included allegations that sulfur dioxide removal equipment has not been developed and costs in excess of $500 million, and that compliance with the sulfur dioxide provision of the state plan "is not necessary to attain the national primary ambient air standards . . . ." 515 F.2d at 210 n.8, 220.

its conclusion is consistent with the wording of that provision.[31]

Similar expressions of the significance of economic and technological considerations under Section 110(a)(2) are found in two cases in which the Administrator had disapproved particular state plan provisions and had promulgated substitute plan provisions under the procedures of Section 110(c)(1) of the Act.[32] Although these cases dealt with the promulgation of implementation plan provisions by EPA, rather than by the state, it is clear that the statutory standards for the EPA promulgation are those set forth in Section 110(a)(2)—the very provisions that are applied by the Administrator in determining whether to approve a state-promulgated plan. In *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 676 (1st Cir. 1974), the court reviewed EPA's promulgation of a transportation control plan for Boston, and concluded that Congress intended the Administrator to enforce compliance with air quality standards even if the costs were great. On the other hand, the court stated that EPA had an obligation to select the least burdensome effective alternative:

> "Economic considerations may play some role, however, in EPA's selection among alternative means to achieve its mandated clean air goal. EPA guidelines encourage states to identify 'costs and benefits' of alternative control strategies. Although

[31] *See also* Appalachian Power Co. v. EPA, 477 F.2d 495, 505 (4th Cir. 1973), in which the Fourth Circuit rejected the government's argument that the Administrator "makes no review of either the economic or technological feasibility of the plan in exercising his power to approve or disapprove the state plan."

[32] 42 U.S.C. § 1857c-5(c)(1) (1970).

> we do not read the Act as requiring EPA to engage in exhaustive cost benefit studies or to initiate elaborate planning exercises, *it could be arbitrary and capricious for the Agency to reject obviously less burdensome but equally effective controls in favor of more expensive or onerous ones.* But we think a considerable part of the burden of suggesting attractive alternative strategies is upon those, like the petitioners, who dislike the present ones." 504 F.2d at 676 (emphasis added) (footnotes omitted).

Most recently the United States Court of Appeals for the District of Columbia Circuit has likewise held that costs and related factors must be taken into account by the Administrator in promulgating a substitute plan to implement Section 110(a)(2). In *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), the court remanded to EPA that part of an implementation plan promulgated by the agency establishing certain bicycle regulations for the National Capital Region. The court stated:

> "After considering this evidence, we must agree with petitioners that the record is simply not sufficient to support promulgation of bicycle regulations for the National Capital Region. In particular, while the Philadelphia study might be a sufficient basis for promulgating bicycle regulations for Philadelphia, it is not adequate to establish that such regulations are *necessary, desirable or practical* for this Region. These regulations will accordingly be remanded to the Administrator for reconsideration. Such reconsideration should include *consideration of cost factors as related to anticipated benefits.*" 521 F.2d at 997 (emphasis added).

Thus, the First, Third and D.C. Circuits have all squarely held that economic and technological factors

must be taken into account by EPA in its consideration of implementation plan provisions under Section 110 (a)(2), at least where it has not been shown that the provisions are necessary for attainment of the standard. None of the circuits sought to rely on a detailed analysis of specific statutory language in support of its conclusion. In each case, however, the holding of the court is consistent with the requirement of Section 110(a)(2)(B) that the control provisions of an implementation plan must not only insure attainment of the national standards, but must also be "necessary" to assure attainment. Control provisions shown not to be necessary and shown to impose unreasonable costs or shown to be tied to technology that is not available must be disapproved by EPA, or invalidated on judicial review if approved by EPA.

B. THE LEGISLATIVE HISTORY OF SECTION 110(a)(2).

In concluding that technological and economic factors may not be considered by the Administrator in deciding whether to approve an implementation plan, the court below relied primarily on the premise that the state was free to adopt its own implementation plan provisions subject only to the requirement that EPA find that the plan assured attainment of the national standards. As stated by the Eighth Circuit:

> "Congress left it to the States to determine economic and technological questions so long as the state's plan would attain the national standards." [33]

[33] 515 F.2d at 216. The court also stated that "it cannot be contended that the States are limited in their implementation plans to doing no more than assuring that the national standards are to be met and maintained." 515 F.2d at 220.

In reaching this conclusion the court either overlooked or misread the legislative history of Section 110(a).

As enacted by Congress in 1970 the Clean Air Act provisions relating to the promulgation of implementa- plans are focused solely and exclusively on attaining the national primary and secondary ambient air quality standards promulgated by EPA pursuant to Section 109.[34] For example, in Section 107, relating to the establishment of air quality control regions, it is stated:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State *which will specify the manner in which national primary and secondary ambient air quality standards will be achieved* and maintained within each air quality control region in such State." [35]

Similarly, Section 110(a)(1) provides for the states to adopt and submit an implementation plan to the Administrator "which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region. . . ." [36] Section 110(a)(2)(A) provides that a plan in order to be approvable by the Administrator must provide "for the attainment of such primary standard as expeditiously as practicable. . . ." [37] And Section 110(a)(2)(B) provides that the plan must include emission limitations and such other measures as may be neces-

[34] 42 U.S.C. § 1857c-4 (1970).
[35] 42 U.S.C. § 1857c-2(a) (1970) (emphasis added).
[36] 42 U.S.C. § 1857c-5(a)(1) (1970).
[37] 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

sary "to insure attainment and maintenance of such primary or secondary standard. . . ."[38]

In every case the state plan provisions are described and limited in terms of attaining and maintaining the national ambient air quality standards promulgated by EPA. There is nothing in any of these provisions that refers to more stringent state standards, or to state plan provisions more stringent than necessary to assure attainment of the national standards. The legislative history of these provisions demonstrates that this failure of the implementation plan provisions of Section 110(a) to refer to more stringent state standards and limitations was by no means an oversight. On the contrary, the House and Senate Conferees expressly decided to *eliminate* language which had been contained in bills passed by both Houses referring to more stringent state standards and limitations.

During its consideration of the Clean Air Act the House reported out a bill (H.R. 17255) which provided for the adoption of national ambient air quality standards and for the submission of state plans to the Secretary. The House proposal would have rewritten proposed Section 108 so that a state plan would be approved by the Administrator if he determined

> "that the plan is consistent with the purposes of this Act insofar as it assures achieving such standard of air quality within a reasonable time." Legis. Hist. at 914; H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 29 (1970) (hereinafter "H. Rep.").

Significantly, the bill went on to provide:

> "A State may adopt an ambient air quality standard applicable to such State or any portion thereof for any pollutant if the [Administrator] agrees such State standard is more stringent than the national ambient air quality standard for such pollutant." Legis. Hist. at 915; H. Rep. at 30.

[38] 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

The House Committee thus made explicitly clear its intention that states may adopt a more stringent ambient air quality standard than the federal standard, and that state plan provisions for the attainment of such standard would become the applicable plan for purposes of both state and federal enforcement.

Similar provisions were contained in the bill passed by the Senate. As reported by the Senate Committee the bill provided for the promulgation of national air quality standards and goals by EPA and for the adoption by the states after a hearing of implementation plans for the implementation, maintenance and enforcement of such standards and goals. Legis. Hist. at 542-44; S. Rep. at 12-14. Section 111(a)(1) (subsequently to become Section 110 of the Act) went on to provide, however:

> "Unless a separate public hearing is provided, each State shall consider adoption of ambient air quality standards which are *more restrictive* than the national ambient air quality standards at the hearing required by this paragraph." Legis. Hist. at 544; S. Rep. at 14 (emphasis added).

Under Section 111(a)(2) the Secretary was required to approve a state implementation plan if he determined that it met certain specified conditions. As in the present law, he was required to determine that the plan provided for the attainment of the national standards within a specified period. In addition, the plan would be subject to approval by the Administrator if he determined that it:

"(B) includes emission requirements, schedules and timetables of compliance, and such other measures as necessary to insure attainment of *any* applicable ambient air quality standard and goal; . . . ." *Id.* (emphasis added).

This language in the Senate passed bill thus required that state plans provide for the attainment and maintenance of the national ambient standards, that states hold a hearing to consider the adoption of more restrictive ambient air quality standards, and that state plans include emission requirements and such other measures "as necessary to insure attainment of any applicable ambient air quality standard." This reference to "*any* applicable ambient air quality standard" obviously referred to either the national ambient air quality standard to be promulgated by EPA or the more stringent state ambient air quality standard referred to in Section 111(a)(1) of the bill.

In reconciling the Senate and House passed bills, the Conferees essentially followed the language of the Senate measure, but made some significant changes. All references to more stringent state standards in Section 110 were eliminated, so that the only reference was to national standards as promulgated by EPA. The final Act—unlike the House and Senate bills—neither encourages nor directs states to consider the adoption of more stringent ambient air quality standards. In addition, the language of Section 110(a)(2)(B) was modified so that instead of referring to attainment of "any applicable ambient air quailty standard" it referred to attainment of "such primary or secondary standard," that is, the national standards promulgated by EPA. Section 110(a)(2)(A)(i).

The Conference Report does not comment upon or seek to explain these modifications in the Senate passed bill, but it is significant that in the Conference Report description of the Senate bill there is a specific reference to the requirement that "each State was to hold public hearings and adopt a plan to implement the *national* ambient air quality standards (or the more stringent *State* standards). . . ." Legis. Hist. at 195; Conf. Rep. at 45 (emphasis added). The obvious deliberate decision of the Conferees to eliminate the explicit provisions in both the House and Senate bills requiring state consideration of more stringent standards (and more stringent implementation plan provisions to meet such standards), must be considered significant for purposes of interpreting the Congressional intent in Section 110(a)(2).

This legislative history, together with the reference in Section 110(a)(2)(B) to such control provisions "as may be necessary to insure attainment and maintenance" of the national standards, reflects a Congressional determination that the federal air quality program should be adopted and enforced in such a way as to insure attainment of the *national* ambient air quality standards. State efforts to promulgate any more stringent standards or to impose more stringent control measures than necessary were not intended to be part of the federal scheme, and thus not subject to approval by EPA and enforceable by the federal government.[39] Instead, the Congressional plan was intended to assure attainment on a national basis of the national standards.

In its consideration of the legislative history of the Clean Air Act the court below made no reference what-

[39] *See* Section IV, pp. 33-38, *infra*.

ever to these changes made by the Conferees, and the elimination in Section 110 of any language encouraging or directing the states to adopt more stringent ambient air quality standards. Instead, the court placed great reliance on the following passage in the Senate Report:

> "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility *as the basis of ambient air standards.* The Committee determined that (1) the health of people is more important than the question of whether the early *achievement of ambient air quality standards protective of health is technically feasible;* and, (2) the growth of pollution load in many areas, even with the application of available technology, would still be deleterious to public health.
>
> "Therefore, the Committee determined that existing sources of pollutants either should *meet the standard* of the law or be closed down, and in addition that new sources should be controlled to the maximum extent possibe to prevent atmospheric emissions." 515 F.2d at 215 (emphasis added), *quoting* from Legis. Hist. at 402-03; S. Rep. at 2-3.

In concluding that this language evidenced a Congressional intention to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan, the court below failed to recognize the distinction between considerations relating to the promulgation of ambient air quality standards, and considerations relating to the adoption of implementation plan provisions necessary for the attainment of such standards. The first paragraph of the quoted portion of the Senate Report is quite clearly referring to the establishment of air quality standards, rather than implementation plan

provisions designed to achieve the standards. The second paragraph suggests that sources operating in such a way as to preclude attainment of the standards should be closed down. Whether or not such a harsh result is carried forward into the Act, it is clear that the reference here is to promulgation and attainment of the standard rather than to the promulgation of specific implementation plan provisions.

At any rate, there is no suggestion in this language from the Senate Report that the promulgation of implementation plan provisions should not take into account technological and economic feasibility, at least where an implementation plan provision is more stringent than necessary to assure attainment of the national standard. The language of Section 110(a)(2)(B), and the action of the Conferees in eliminating the references to more stringent state standards, evidence a Congressional intent that technical and economic factors be considered in the promulgation and approval of implementation plan provisions that are or may be more stringent than necessary for the attainment of the national standards.

IV. Under Section 116 of the Act Standards More Stringent Than Necessary Are Outside an Implementation Plan.

The court below sought additional support for its conclusion that technological and economic factors may not be considered on judicial review of EPA approval of a state implementation plan from Section 116 of the Act:[40]

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[40] 42 U.S.C. § 1857d-1 (1970), formerly Pub. L. 90-148, § 2, 81 Stat. 497 (former Section 109 was substantially amended and renumbered Section 116).

> "In addition, the fact that States may adopt and enforce emission standards and control strategies even more stringent than the federal serves to further limit the discretionary area of [the Administrator's] authority to approve or disapprove an implementation plan." [41]

Here again, however, the court below failed adequately to analyze the statutory language or to consider the relevant legislative history.

The Clean Air Act prior to the 1970 Amendments provided with respect to higher state standards:

> "Section 109. Nothing in this title shall prevent a State, poitical subdivision, inter-municipal or interstate agency from adopting standards and plans to implement an air quality program which will achieve a higher level of ambient air quality than approved by the Secretary."

As passed by the House the 1970 Amendments would have retained this provision, except to substitute the words "that prescribed or" before "approved" in order to account for the fact that under the House bill the Administrator would be authorized to promulgate national standards. Legis. Hist. at 912; H. Rep. at 27. As we have already shown, the House bill at this stage explicitly encouraged states to adopt ambient air quality standards more stringent than the national standards. *Supra* at pp. 28-29.

The bill passed by the Senate included a more comprehensive provision relating to state standards. It provided:

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[41] 515 F.2d at 212-13 (footnotes omitted).

> "Section 112. Nothing in this title shall be construed as preventing a State, political subdivision thereof, inter-municipal or interstate agency from adopting, within the time provided in sections 110 and 111 of this Act, or revising after such time, ambient air quality standards and implementation plans, including emission requirements, to implement an air quality program which will (A) attain and maintain a higher level of air quality than is specified in any national ambient air quality standard promulgated pursuant to this Act, or (B) attain and maintain the level of air quality specified in any national ambient air quality standard within a shorter period of time than required by this Act, or from adopting within the time provided in section 114 or section 115 of this Act, or revising after such time, emission standards more stringent than those established by the Secretary." Legis. Hist. at 553; S. Rep. at 23.

The Conferees accepted neither the House nor Senate version of this provision, and instead added a Section 116 which read as follows:

> "Except as otherwise provided . . . nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section." Legis. Hist. at 165; Conf. Rep. at 15.

This language, which became law, differs significantly from the corollary language in the Senate bill.

The Senate provision explicitly referred to the adoption by a state of ambient air quality standards and implementation plans "within the time provided in sections 110 and 111" which will attain and maintain a higher level of air quality than is specified in the national standard. It is clear that this provision, together with the language referred to earlier in Section 111(a)(1) directing the states to consider more stringent ambient air quality standards,[42] contemplated that the state would be permitted and encouraged to consider even more stringent air quality standards, as well as emission requirements to assure attainment of any applicable standard, *as part of the implementation plan* to be adopted and submitted by the state and approved by EPA.

The provision which became law, however, substantially modifies this language. First, Section 116 makes no explicit reference to state adoption of standards attaining a higher level of air quality. Instead, it expresses an intent not to deny a state the right to adopt any standard it wished, except for one which is less stringent than the national standards, as a matter of state law. Second, the language no longer contemplates the incorporation of the more stringent standard and corollary emission requirements within the state implementation plan to be submitted to EPA for approval. The reference to adoption of more stringent standards within the times provided in Sections 110 and 111 was eliminated. This change was consistent with the change made by the Conferees in Section 110, eliminating the specific Senate reference to state adoption of more stringent state standards, and emission limitations to achieve "any" applicable standard.

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[42] *Supra* at pp. 29-30.

In the light of these changes made by the Conferees in the Senate bill, an unmistakable statutory pattern emerges. As passed by the Senate, the bill directed states to consider adoption of more stringent standards within the time limits specified in the bill, and explicitly required that the implementation plan include emission requirements that would achieve any applicable national or more stringent state standard. The Conferees rejected this approach, eliminating the direction that states consider adoption of more stringent standards, and changing the language of Section 110 so that emission limitations would be those necessary to assure attainment of the national standards, rather than any applicable standard. Similarly, the changes in Section 116 eliminated the references to the adoption of more stringent state standards and implementation plans under the Clean Air Act.

What was left was a scheme under which EPA would adopt national standards and states would adopt implementation plans including emission limitations and other controls necessary to assure attainment of such standards. At the same time Congress made clear that a state could on its own—*i.e.,* independent of what was done within the implementation plan submitted to EPA—adopt any standard or limitation it wished, so long as it was not less stringent than those required to meet the national standards. The language of Section 116 makes clear that more stringent standards or limitations adopted by a state would be *outside* of the implementation plan, rather than a part of it.

The distinction is significant. The federal effort of administration and enforcement should be directed to achieving the national standards and should not be diluted by efforts directed at achieving more stringent

levels in particular states. Although the Act makes clear that the states themselves could go further than the national standards, more stringent standards and limitations were left to the states to enforce.

Under this statutory scheme, then, it is entirely logical that the Administrator would take into account economic and technological factors in reviewing state implementation plan provisions that are more stringent than necessary for attainment of the national standards. Thus, contrary to the conclusion of the court below, Section 116 has no application to the action of the Administrator in reviewing and approving a state plan under Section 110, or to a state in adopting and submitting such a plan for approval.

V. Where the Courts of Appeals Have Held That Review of the Administrator's Failure to Consider Economic and Technological Factors Was Premature, the Parties to Those Proceedings May Subsequently Raise Issues Relevant to Those Factors in the Course of Enforcement Proceedings.

This Court should also resolve issues arising from the sharp division in the circuits as to the time at which economic and technological factors must be considered. As we have shown, the language of the Clean Air Act, as supported by its legislative history, clearly requires the Administrator to consider economic and technological factors in determining whether to approve a plan under the criteria enumerated in Section 110(a)(2). In cases where the circuits have agreed with this interpretation, the Administrator has taken or will take appropriate action. *See Appalachian Power,* and *St. Joe Minerals, supra.* A problem arises, however, as a result of the decisions of the Sixth and Seventh Circuits, in which the courts properly ruled that economic

and technological factors were relevant, but held that such factors should be considered by the district court only at the time of enforcement and not during the approval process. *Buckeye Power, Inc.* v. *EPA,* 481 F.2d 162, 173 (6th Cir. 1973); *Indiana & Michigan Electric Co.* v. *EPA,* 509 F.2d 839, 844-45 (7th Cir. 1975). In order that the parties to the latter review proceedings have some opportunity to present their technological and economic arguments, they must be permitted to present those arguments to the district courts during proceedings brought to enforce the state plans. An affirmation of this right by this Court is particularly unwarranted in view of the Eighth Circuit's holding that such economic and technological factors need not be considered by the Administrator and in any event are "not appropriate for judicial resolution." 515 F.2d at 219.

Fairness to the petitioners in those cases clearly dictates such a result. In effect, the parties in the Sixth and Seventh Circuit cases were assured of a time and a forum in which to assert the technological and economic issues relating to the state plans in question, *i.e.,* before a district court at the time of enforcement. The parties having gained in substance the relief desired, there was thus no need to engage in the uncertain enterprise of seeking Supreme Court review as to the timing of such relief.[43]

The soundness of this proposition is underscored by the express provisions of Section 10(b) of the Admin-

[43] This Court could conceivably hold that EPA should withdraw and reexamine its approvals to date of *all* state plans, and allow affected parties to comment on economic and technological factors. The alternative proposed by amici is far narrower in scope and, we feel, sounder and administratively more expeditious.

istrative Procedure Act, which provides: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703 (1970). Because the decisions in *Buckeye Power, Inc., supra,* and *Indiana & Michigan Electric Co., supra,* squarely hold that judicial review of arguments relating to economic and technological factors could not be considered in a Section 307(b)(1) proceeding, no "prior, adequate, and exclusive opportunity for judicial review" of these issues had been provided to the parties in those cases. It follows that those aspects of the Administrator's approval are subject to review in "proceedings for judicial enforcement" of the relevant state plans. The Sixth and Seventh Circuit opinions clearly recognized that the result of their holdings was merely to delay consideration of the arguments being presented until such time as enforcement proceedings may be commenced.

Precisely because no prior opportunity for judicial review had been available, Section 307(b)(2) of the Act [44] should provide no obstacle to judicial review at the enforcement stage. The Seventh Circuit's opinion dealt succinctly with the applicability of this provision:

> "since we hold that a plan's technological feasibility and economic impact need not be considered by the Administrator in approving a state plan under Section 110(a)(2) and, a fortiori, that such fac-

[44] Section 307(b)(2) provides: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 1857h-5(b)(2) (1970).

> tors do not form a basis for review of such approval by this court under Section 307(b)(1), it follows that Section 307(b)(2) does not preclude petitioners from presenting technological feasibility and economic impact arguments in the course of enforcement proceedings." 509 F.2d at 845.

See also Buckeye Power, Inc. v. *EPA, supra,* 481 F.2d at 173. The Supreme Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967), a landmark decision involving pre-enforcement review in the district courts, held that the presumption that judicial review is available can be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." There has been and can be no such showing here.[45]

Moreover, amici submit that even as to cases where there will be general consideration of technological and economic issues at the approval stage, the Act does not preclude further consideration of such issues at the enforcement stage. It is logical that issues of a general nature be considered at the approval stage, but the Senate Report on Section 307(b) makes it clear that "[o]f course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone." [46] If there are reasons why a state plan is un-

[45] Section 307 of the Act was intended to remedy the uncertainties in the then existing Clean Air Act relative to the availability of judicial review by explicitly providing for such review under Sections 307 and 304, the citizen suit provision. *See, e.g.,* Legis. Hist. at 440-42; S.Rep. at 40-42. It would be anomalous to interpret a provision intended to guarantee the availability of judicial review as, in effect, precluding such review.

[46] Legis. Hist. at 441; S. Rep. at 41.

duly stringent and economically or technologically unfeasible as applied to a particular source, the affected company should have the right to bring these factors to the attention of the district court in enforcement proceedings.

Finally, in light of the crabbed interpretation of the role of the courts by the Eighth Circuit, it would be appropriate for this Court to emphasize that during enforcement proceedings before the district court under Section 113 of the Act [47] the parties must have an opportunity for *de novo* consideration of their contentions. It could hardly be otherwise because the Clean Air Act provides no administrative procedure for determining whether a person has violated a state plan.[48] A natural reading of Section 113 leads one to the conclusion that the district court is the intended forum in which an alleged violator would get a full *de novo* hearing on any defenses he may wish to present. Such defenses would include the inapplicability or invalidity of a provision of the plan.[49]

De novo consideration of technological and economic factors at the enforcement stage is also warranted due to the absence of an adequate administrative record addressed to those issues. During the approval process

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[47] 42 U.S.C. § 1857c-8 (1970).

[48] It is true that the Administrator must notify a person that he is in violation of a requirement of an applicable implementation plan before a civil enforcement action may be commenced against him. However, a notification of violation is an entirely unilateral act of the Administrator. No formal opportunity to respond to the notice is provided for in the Act, or in EPA's regulations. Neither does the Act mention any other means to contest the Administrator's notification short of the civil enforcement proceeding.

[49] *See* Reichhold Chemicals v. EPA, 8 ERC 1207 (7th Cir. 1975).

of the state plans the Administrator observed none of the procedural requirements of the APA attendant to informal rulemaking. 5 U.S.C. § 553 (1970). As a result, no notice of proposed approval or disapproval was given the public and, more importantly, no comments were requested thereon. Faced with such a bare record, and faced with no determination by the Administrator as to the economic and technological feasibility of a state plan, an enforcement court would be required to engage in independent fact-finding, drawing its own conclusions from the record created. *See Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416, 420 (1971).[50]

These same considerations dictate in favor of judicial review of technological and economic factors on a *de novo* basis when a petition for review has been filed in the court of appeals based on grounds arising more than 30 days from the date of EPA promulgation or approval of an implemention plan. As in the case where *de novo* review is appropriate at the enforcement stage because of facts particular to the facility or because of the denial of appellate review by a court of appeals, there is no adequate administrative record with respect to issues based upon information arising more than 30 days after EPA has acted. This aspect of the decision below—although not addressed in this brief—is considered at length in the Brief for Petitioner at pages 12, and 22-32.

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[50] In one important respect the Sixth and Seventh Circuit cases are more compelling ones for *de novo* review than *Overton Park,* since under the former cases the parties will be defendants in civil or criminal enforcement proceedings. *See generally* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, The Federal Courts and the Federal System 338-44 (2d ed. 1973).

For the foregoing reasons, this Court should hold that where the circuit courts have ruled that economic and technological factors need not be considered at the approval stage, these factors must be considered by the courts *de novo* in enforcement proceedings. This Court should also hold that further consideration by the courts of economic and technological issues as they apply to the particular facility is required at the enforcement stage in all cases, and that such issues must be reviewed on a *de novo* basis where a petition for review has been filed based on grounds arising more than 30 days from the date of EPA approval.

CONCLUSION

The language and history of Section 110(a)(2) of the Act requires that the Administrator may not approve or promulgate excessively stringent provisions of an implementation plan if such provisions are impossible of attainment because of the unavailability of technology or excessive costs. The decision of the Eighth Circuit, which precludes judicial review of the agency's failure to consider economic and technological factors by the Administrator in his approval of state

plans, and holds that these factors are not relevant, should be reversed.

Respectfully submitted

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November 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

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INDEX

Page

Interest of Amicus Curiae 1

Argument 2

I. The Administrator must disapprove any plan that does not insure attainment and maintenance of ambient standards. The techonological or economic feasibility of compliance with an emission limitation is relevant in determining whether a plan meets that requirement 3

II. The Administrator must disapprove any plan that does not specify a "reasonable time" for attainment of secondary standards. Technological and economic considerations are relevant in determining whether a plan meets that requirement 8

III. Section 116 of the Clean Air Act does not limit the Administrator's discretion to disapprove an implementation plan 11

IV. The so-called "technology forcing" aspect of the Clean Air Act underscores the need for judicial review based upon new technological or economic information 13

Conclusion 14

CITATIONS

CASES:

Consolidated Edison Co., 44 F.P.C. 350 (1970), *aff'd,* Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied,* 407 U.S. 926 (1972) 6

Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974) 5

Page

Duquesne Light Co. v. EPA, — F.2d —, 8 E.R.C. 1065 (3d Cir. Aug. 21, 1975) 14
General Elec. Co. v. Southern Construction Co., 383 F.2d 135 (5th Cir. 1967), *cert. denied,* 390 U.S. 955 (1968) 12
Hecht Co. v. Bowles, 321 U.S. 321 (1944) 5, 6
Meredith v. City of Winter Haven, 320 U.S. 228 (1943) 5
Pennsylvania v. Penn. Power Co., 5 E.R.C. 1373 (Penn. C.P., Apr. 19, 1973), *aff'd,* 337 A.2d 823 (1975) .. 5
St. Joe Minerals Corp. v. EPA, 508 F.2d 743 (3d Cir. 1975) 10, 13
Train v. NRDC, 421 U.S. 60 (1975) 3, 4, 9, 10, 13
Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975) 2, 6, 7, 8, 11

STATUTES:

Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), *as amended,* Pub. L. No. 93-319, 88 Stat. 246 (1974) 2

§ 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970).. 8
§ 110, 42 U.S.C. § 1857c-5 (1970) 2, 3, 8, 12, 13
§ 110(a), 42 U.S.C. § 1857c-5(a) (1970) 7, 9
§ 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970).9, 10
§ 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970) 3, 7
§ 110(c), 42 U.S.C. § 1857c-5(c) (1970) 8
§ 113(a), 42 U.S.C. § 1857c-8(a) (1970) 4
§ 113(b), 42 U.S.C. § 1857c-8(b) (1970) 4
§ 116, 42 U.S.C. § 1857d-1 (1970) 11, 12, 13
§ 302(h), 42 U.S.C. § 1857h(h) (1970) 9
§ 304(b), 42 U.S.C. § 1857h-2(b) (1970) 5
§ 307(b), 42 U.S.C. § 1857h-5(b) (1970) 2
§ 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970). 6
§ 307(b)(2), 42 U.S.C. § 1857h-5(b)(2) (1970). 6

Federal Water Pollution Control Act, 33 U.S.C. § 1151 *et seq.* (Supp. II, 1972)

§ 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (Supp. II, 1972) 12
§ 510, 33 U.S.C. § 1370 (Supp. II, 1972) 12

Page

MISCELLANEOUS:

30 C.J.S. Equity § 16 (1965) 5
H.R. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970) ... 9
S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970).8, 10, 11, 13
116 Cong. Rec. S16,095 (daily ed. Sept. 21, 1970) 11
H.R. 17255, 91st Cong., 2d Sess. (Apr. 27, 1970) 6
Hearings on Implementation of the Clean Air Act Amendment of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 2d Sess., pt. 1 (1972) 11
40 Fed. Reg. 50032, 50033 (1975) 7

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BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

In compliance with this Court's Rule 42, Edison Electric Institute has received the written consents of counsel for petitioner and respondent to file this brief amicus curiae. Those consents have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 198 companies that supply electricity to 77.6 percent of all the electric service customers in the United States. Those companies operate some 1300 steam-electric generating plants that are subject

to regulation under the Clean Air Act ("the Act") [1] and the State implementation plans adopted under the Act. EEI submits this brief in support of reversal of the Eighth Circuit's decision in this case.[2]

Skyrocketing costs and unrealized technological expectations compete with national and international energy policies to frustrate the realization of State implementation plan requirements. The court below, however, has held that such economic or technological factors must be ignored by the agency and the courts. Unless that holding is reversed, EEI member companies will be subjected to the threat of Federal enforcement actions when they cannot comply with unreasonable pollution control requirements that are either inconsistent with the specific requirements of the Act or unnecessary to carry out the objectives of the Act.

ARGUMENT

The question before this Court is a jurisdictional one. The narrow issue that must be resolved is whether —*under any circumstances*—technological and economic factors are relevant to the Administrator's approval of a State implementation plan under section 110 of the Act and thus are relevant to a judicial review proceeding involving such an approval.

The court below held that it lacked jurisdiction under section 307(b) of the Act to hear petitions for review that are factually based upon economic or technological considerations and that challenge the Admin-

[1] 42 U.S.C. § 1857 *et seq.* (1970), *as amended,* Pub. L. No. 93-319, 88 Stat. 246 (1974). For convenience, all references will be to the section numbers of the Clean Air Act rather than the United States Code; citations to both appear in the Table of Citations.

[2] Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975).

istrator's approval under section 110. That holding is based solely on the court's conclusion that technological and economic factors are not relevant to the Administrator's approval of implementation plan requirements. If any circumstances exist, however, under which section 110 could require that the Administrator disapprove an emission limitation proposed by a State on technological or economic grounds, then questions of economic and technological feasibility are clearly relevant and the decision below is in error on this fundamental issue.

EEI respectfully submits that the decision below is wrong. There are numerous circumstances in which consideration of technological and economic factors would require the Administrator to refuse to approve a particular part of a proposed plan. Since the question is solely jurisdictional, however, it is not necessary for this Court to identify each and every circumstance in which such considerations might justify a court setting aside the Administrator's approval or to determine the weight that must be given to technological or economic factors. Accordingly, the examples in sections I and II of the Argument are not intended to enumerate all possible circumstances.

I. The Administrator must disapprove any plan that does not insure attainment and maintenance of ambient standards. The technological or economic feasibility of compliance with an emission limitation is relevant in determining whether a plan meets that requirement.

Section 110(a)(2)(B) of the Act requires that an implementation plan include "emission limitations" that will "insure attainment and maintenance" of ambient standards. In *Train* v. *NRDC,*[3] the Court described those emission limitations as "specific rules

[3] 421 U.S. 60 (1975).

to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards."[4] The Court also emphasized that a State is free to choose whatever mix of limitations it deems "best suited" to its needs *"so long as the ultimate effect* of a State's choice of emission limitations *is compliance with the national standards for ambient air."*[5] Of course, emission limitations that are not enforceable cannot insure compliance with ambient standards. Thus, in determining the "ultimate effect" of a State's mix of emission limitations, the Administrator must determine whether those limitations will in fact be enforceable under the Act.

Section 113(a) authorizes EPA to issue enforcement orders. Any EPA order for enforcement of an implementation plan requirement must specify a "reasonable time" for compliance with that requirement. If compliance with a limitation were technologically or economically impossible, however, EPA could not specify a "reasonable time" for compliance. Thus, in such circumstances, an enforcement order could not be issued.

District courts may enforce implementation plan requirements by injunction or restraining order.[6] A

[4] *Id.* at 78.

[5] *Id.* at 79 (emphasis added).

[6] The Act does not provide civil penalties. Section 113(b), however, allows the Administrator to commence a civil action in district court for appropriate relief, including permanent or temporary injunction, whenever any person "violates any requirement of an applicable implementation plan." District courts are not directed to issue an injunction simply because a violation is proved. Rather, the section merely provides that the courts "shall have jurisdiction

request for injunction or restraining order, however, is "[a]n appeal to the . . . sound discretion which guides the determinations of courts of equity."[7] Enforcement is not mandatory; it is discretionary.[8] Thus, if a defendant showed that compliance was technologically or economically impossible, the district court could refuse to issue an injunction.[9] Also, particularly in cases where compliance is not required to meet primary (public health) standards, a court could de-

to restrain such violation and to require compliance." Section 304(b) allows any person to commence a civil action to enforce an implementation plan requirement. That section also gives district courts jurisdiction to enforce such requirements by injunction without directing the court to issue an injunction simply because a violation is proved. *See* note 8 *infra.*

[7] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) *citing* Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943). In contrast to the provisions of the Act which merely give the district courts jurisdiction to enforce agency regulations, the statute in the *Hecht Co.* case provided that whenever the agency proved a violation "a permanent or temporary injunction, restraining order, or other order *shall be granted without bond.*" 321 U.S. at 322 (emphasis added). Even in the face of this language, the Court held that the section "affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices . . . ." 321 U.S. at 330.

[8] "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." Hecht Co. v. Bowles, 321 U.S. at 329.

[9] Implementation plans often require source owners to use a certain type of fuel or limit emissions to a specified rate. *See* Detroit Edison Co. v. EPA, 496 F.2d 244, 246 n.2 (6th Cir. 1974). Thus, if EPA requested an injunction directing the source owner to burn such fuel or install equipment to meet the emission rate, a defense of impossibility would preclude issuance of the injunction. *See* 30 C.J.S. *Equity* § 16 (1965). *Cf.* Pennsylvania v. Pennsylvania Power Co., 5 E.R.C. 1373 (Penn. C.P., Apr. 19, 1973), *aff'd*, 337 A.2d 823 (1975).

cline to restrain operation of a facility when granting such relief would be contrary to the public interest.[10]

In summary, technological and economic factors are important in determining whether an emission limitation is enforceable under the Act.[11] Unless the Admin-

[10] The discretion of a district court is, of course, "conditioned by the necessities of the public interest which Congress has sought to protect" in the statute. Hecht Co. v. Bowles, 321 U.S. at 330. The statement cited by the court below that industry must meet the *health* standards of the Act or be shut down, 515 F.2d at 215, may be said to leave the courts little discretion when compliance with an emission limitation is required to meet primary standards. Even in those circumstances, however, a court might refuse to enjoin operations. For example, in cases involving power plants, closing the facility could have a severe and immediate adverse affect on the public health. *See* Consolidated Edison Co., 44 F.P.C. 350, 364 (1970), *aff'd*, Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

[11] It should be noted that if the holding of the court below regarding the scope of section 307(b)(1) review were reversed, a district court could only consider technological and economic factors in determining whether to grant equitable relief. A district court could not consider a technological or economic challenge to the approval of the limitation that the Administration was seeking to enforce. Clean Air Act § 307(b)(2).

It should also be noted that the House bill would have expressly required district courts to consider technological or economic factors in enforcement proceedings, H.R. 17255, 91st Cong., 2d Sess. § 108(c)(4) (Apr. 27, 1970), whereas the final version of the Act merely states that the district courts have jurisdiction to issue injunctions (see note 6 *supra*). Certainly the conferees' decision not to *require* district courts to give "due consideration" to those factors in every case does not reflect a Congressional intent that those factors be *ignored* by a court if raised by a defendant in opposition to an injunction. Interpreting the Act to require the district courts to ignore such factors in granting equitable relief would mean that the statute mandates the issuance of an injunction whenever a violation is proved. "[I]f Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." Hecht Co. v. Bowles, 321 U.S. at 329. *See* notes 7-8 *supra*.

istrator considers those factors, critical portions of implementation plans may become meaningless. An interpretation of the Act that allows the Administrator to approve limitations that are unenforceable on technological or economic grounds would frustrate the Congressional intent that the public health and welfare be protected through the timely attainment and maintenance of ambient standards. From the standpoint of section 110(a), it makes no difference whether compliance with ambient standards is frustrated by the inclusion of stringent limitations that are not enforceable or is frustrated by the inclusion of limitations that are too lax. Accordingly, since technological and economic factors may render emission limitations unenforceable, those factors are relevant in determining whether the requirements of section 110(a)(2)(B) have been met.[12]

The legislative history provides no support for the lower court's sweeping conclusion to the contrary that economic or technological feasibility may never be considered in approving an implementation plan.[13] In fact, properly construed, one statement from the Senate Report relied upon by the court flatly contradicts its conclusion.

According to the Report, proving a violation of an implementation plan emission requirement "would not require reanalysis of technological or other considerations at the enforcement stage [because] [t]hese mat-

[12] The Administrator has interpreted the Act to authorize disapproval of State pollution control requirements that he determines are unenforceable. *See, e.g.*, 40 Fed. Reg. 50032, 50033 (1975) (disapproval of Indiana "fugitive dust" regulation).

[13] 515 F.2d at 215. *See* note 24 *infra* & accompanying text.

ters *would have been settled in the administrative procedure leading to an implementation plan . . . .*" [14] In construing this statement, the court below simply ignored the fact that the Administrator's independent review under section 110 of a proposed State plan is just as much a part of the "administrative procedure leading to an implementation plan" as are any hearings held by the State.[15] Therefore, the cited passage reflects a Congressional understanding that the Administrator is *required* to consider technological and economic factors before approving a State plan.

II. The Administrator must disapprove any plan that does not specify a "reasonable time" for attainment of secondary standards. Technological and economic considerations are relevant in determining whether a plan meets that requirement.

Under the Act, secondary ambient air quality standards are those that "in the judgment of the Administrator [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." [16] Unlike the requirements that apply to emission limitations implementing primary standards,

[14] S. REP. No. 91-1196, 91st Cong., 2d Sess. 36 (1970) (emphasis added). It should be noted that this statement concerns the "objective evidentiary standard" that must "be met by the citizen who brings an action . . . ." *Id.* It does not address the equitable standard the court will apply in determining whether to grant the relief requested. *See* notes 6, 8-9 & 11 *supra.*

[15] 515 F.2d at 216. The fact that an implementation plan may be promulgated by the Administrator underscores the error in the court's analysis. *See* Clean Air Act § 110(c).

[16] Clean Air Act § 109(b)(2).

which were the central concern in *Train* v. *NRDC*,[17] Congress did not demand that secondary standards be attained by a fixed statutory deadline. Rather, Congress required only that they be attained within a "reasonable time." [18] The reason for this distinction is obvious: The public interest in protecting the health of people exceeds the public interest in protecting against known or anticipated "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." [19]

Section 110(a)(2) requires that a plan implementing a secondary standard specify "a reasonable time at which such secondary standard will be attained" and include emission limitations necessary to attain and maintain that standard. Economic, technological, and even social factors must be considered in determining what period of time is "reasonable." If a review of those factors discloses that the date specified in the plan for compliance with secondary standards and related limitations is "unreasonable," the Admin-

[17] [T]he principal of these conditions [in section 110(a)] and the heart of the 1970 Amendments, is that the plan provide for the attainment of the national primary ambient air quality standards . . . "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan."

421 U.S. at 66-67.

[18] *See* H.R. REP. No. 91-1783, 91st Cong., 2d Sess. 45 (1970):

> The conference substitute follows the Senate amendment in establishing deadlines for implementing primary . . . standards but leaves the States free to establish a reasonable time period within which secondary . . . standards will be implemented.

[19] Clean Air Act § 302(h).

istrator must disapprove the plan on the ground that it does not meet the requirements of section 110(a)(2). Thus, it is clear that the Administrator cannot ignore economic and technological factors in reviewing the adequacy of a State plan to implement secondary standards.[20]

This analysis is consistent with the statement of the Court in *Train* v. *NRDC* that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations *if they are a part of a plan which satisfies the standards of § 110(a)(2)* . . . ."[21] That statement recognizes that the Administrator has authority to question the State's choices of limitations when the plan does not satisfy section 110(a)(2). While the Administrator might give great weight to a determination of reasonableness by a State, it is his function under the Act to decide on the basis of the entire record if the requirements of section 110(a)(2) have been satisfied.[22]

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[20] *See* St. Joe Minerals Corp. v. EPA, 508 F.2d 743, 748 (3d Cir. 1975). In the Petition for Certiorari in that case, No. 74-1650 (U.S., filed June 29, 1975) at 5 n.3, the Government asserted:

> [T]hat these temporal limitations were not intended to require EPA to consider feasibility for all sources is indicated by the fact that "in no case" may the plan provide for attainment of primary standards later than three years from its approval.

The Government, of course, simply ignored the fact that the statute provides that *sceondary* standards are to be attained within a "reasonable time."

[21] 421 U.S. at 79 (emphasis added).

[22] Under the Senate bill, the States were free to choose whatever attainment date for air quality goals that they wished. *See* S. REP. No. 91-1196, *supra* note 14, at 11. This discretion was limited in conference by requiring that implementation plans specify a "reasonable time" for attainment of secondary standards.

Finally, not only did the court below misconstrue the legislative history of the Act,[23] but it also failed to appreciate the distinction between discussions regarding primary standards and those regarding secondary standards.[24] None of the statements relied upon by the court even imply that Congress considered technological and economic factors to be irrelevant in determining the attainment date for secondary standards.

III. Section 116 of the Clean Air Act does not limit the Administrator's discretion to disapprove an implementation plan.

According to the Eighth Circuit, "the fact that States may adopt and enforce emission standards and control strategies even more stringent than the federal serves to further limit the discretionary area of his authority to approve or disapprove an implementation plan."[25] To support this mistaken deduction, the court cites section 116 of the Act. That section, however, does not even mention the Administrator's obli-

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[23] *See* pp. 7-8 *supra*.

[24] The Senate Report expressed the view that "*the health of people* is more important" than questions of technical feasibility. S. REP. No. 91-1196, *supra* note 14, at 2 (emphasis added). Senator Muskie stated that the mandatory attainment date for primary standards is "based not, I repeat, on economic and technological feasibility, but *on considerations of public health.*" 116 CONG. REC. S16,095 (daily ed. Sept. 21, 1970) (emphasis added). Senator Eagleton expressed his recollection that the enforcement provision in the conference bill followed the Senate bill "which had no economic factor *as far as protection of public health was concerned.*" *Hearings on Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess., pt. 1, at 21 (1972) (emphasis added). Each of these statements cited by the court refers to primary standards. 515 F.2d at 215.

[25] 515 F.2d at 213 (footnote omitted).

gations or discretion under section 110.[26] If Congress had intended to limit the Administrator's obligation or discretion under section 110, Congress would have done so expressly.[27] Indeed, if relevant at all, section 116 supports reversal of the decision below.

Section 116 addresses the degree to which the Clean Air Act preempts State regulation of air quality. On the one hand, section 116 establishes that the Act does not prevent a State from adopting and enforcing an emission limitation that is more stringent than a limitation "in effect under an applicable implementation plan." On the other hand, the section precludes a State from imposing a less stringent limitation than

[26] Section 116 provides:

> Except as otherwise provided in [the sections preempting State regulation of moving sources] nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[27] The absence of any requirement in § 110 that the Administrator must approve more stringent State limitations is in striking contrast to section 301(b)(1)(C) of the Federal Water Pollution Control Act ("FWPCA"). 33 U.S.C. § 1311(b)(1)(C) (Supp. II, 1972). That section specifically requires compliance with "any more stringent limitation . . . established pursuant to any State law or regulations (under authority preserved by section 510)." Section 510 of the FWPCA is virtually identical to § 116 of the Act. 33 U.S.C. § 1370 (Supp. II, 1972). "'[I]n the absence of a clear intent to the contrary, 'where a statute with respect to one subject contains a given provision, the omission of such provision from *a similar statute is significant to show a different intention existed.*' " General Elec. Co. v. Southern Construction Co., 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied,* 390 U.S. 955 (1968) (emphasis added) (citations omitted).

is in effect under a Federal plan. Since the requirements of section 110 of the Clean Air Act, not State law, must ultimately govern the content of a Federal implementation plan, section 116 explicitly recognizes that emission limitations under a Federal plan may be less stringent than State limitations. Thus, section 116 does not evince a Congressional intent to affect the Administrator's discretion under section 110.[28]

IV. The so-called "technology forcing" aspect of the Clean Air Act underscores the need for judicial review based upon new technological or economic information.

When presented with petitions for review filed after the expiration of the initial 30-day period, courts of appeals must decide whether "significant new information"[29] brings into question the validity of the Administrator's earlier action. In the case of approvals under section 110, judicial review based upon new technological or economic information has special significance because the Administrator has viewed the Clean Air Act as "technology forcing."[30]

The concession by the Administrator that he considers the Act as "technology forcing"[31] helps to explain the present deficiencies in many State implementation plans. Those plans, as approved by the Administrator, included emission limitations that were not grounded in proven technology.[32] Rather, the limitations in those plans were based upon expectations that

[28] *See* St. Joe Minerals Corp. v. EPA, 508 F.2d at 748-49.

[29] S. Rep. No. 91-1196, *supra* note 14, at 42.

[30] *See* Train v. NRDC, 421 U.S. at 90-91.

[31] Petition for Certiorari at 6, EPA v. St. Joe Minerals Corp. No. 74-1650 (U.S., filed June 29, 1975).

[32] *See, e.g.,* St. Joe Minerals Corp. v. EPA, 508 F.2d at 745.

source owners could find, purchase and install equipment that would meet the limitations within the deadline established under the plan. Subsequent events beyond the control of source owners, however, have either prevented the fulfillment of those expectations or proved them false. In other words, the predicate upon which such limitations were based has vanished.[33] Thus, the so-called "technology forcing" aspect of the Act's administration makes it critically important that those subject to regulation be allowed to seek judicial review based upon new technological and economic information.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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[33] *See* Duquesne Light Co. v. EPA, — F.2d —, 8 E.R.C. 1065, 1074 n.36 (3d Cir. Aug. 21, 1975).

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No. 74-1542

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ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:

Appalachian Power Company v. Environmental Protection Agency, 477 F.2d 495 (4th Cir. 1973) 3
Buckeye Power Company v. Environmental Protection Agency, 481 F.2d 162, 165 (6th Cir. 1973) 4
Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1972) 3
Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972) 5
Indiana & Michigan Electric Company v. Environmental Protection Agency, 509 F.2d 839, 845 (7th Cir. 1975) 4
St. Joe Minerals Corp. v. Environmental Protection Agency, 508 F.2d 743 (3d Cir. 1975)..... 3, 6, 7
U.S. Steel Corp. v. Fri, 364 F.Supp. 1013 (N.D. Ind. 1973) 5

STATUTES AND REGULATIONS:

Clean Air Act, As Amended

42 U.S.C. § 1857c-5(a)(2)(A)(i) 5
42 U.S.C. § 1857c-5(a)(3)(B) 5
42 U.S.C. § 1857c-5(d) 5
42 U.S.C. § 1857c-8 5
42 U.S.C. § 1857d-1 4
42 U.S.C. § 1857h-2 5

40 C.F.R. § 51.13(b)(2) 5

LEGISLATIVE MATERIAL:

H. Conf. Rep. 93-1085, 93d Cong., 2d Sess. 40 (1974).. 5

MISCELLANEOUS:

Federal Power Commission, Potential Effects of Air Quality Regulations on The Bulk Electric Power Supply (February, 1974) 2

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BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

INTEREST OF AMICI CURIAE

Amici Appalachian Power Company, Indiana & Michigan Electric Company, Kentucky Power Company, and Ohio Power Company, are electric utilities

which rely predominantly on coal to fuel their existing generating units. Each of these companies is a part of the American Electric Power System, which is the largest investor-owned electric power system in the United States. Three of these companies were parties in the related Fourth and Seventh Circuit decisions discussed below. Counsel for petitioner and respondent have consented to the filing of this brief.

The need for federal and state regulations to improve the quality of our air is fully recognized, and their general objectives are supported by electric utilities. However, the electric utility industry faces complex and serious problems involving the cost, technology, and time for compliance with Clean Air Act requirements. Some of the evolving regulations, particularly those involving sulfur dioxide standards, not only have been developed without proper scientific evidence of need, but also fail to recognize the technological infeasibility and severe adverse economic and social impact of the standards. Thus, in February, 1974, the Federal Power Commission issued a report which concluded that the nation's electric power supply will be critically deficient if EPA continues to insist upon strict enforcement of existing air quality standards.[1]

Because a sensible balance must be achieved between the requirements of a healthy environment and all other aspects of the public interest, including the general economy, and for the reasons set forth below, we urge that this Court review the decision of the Court of Appeals.

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[1] Federal Power Commission, Potential Effects of Air Quality Regulations on The Bulk Electric Power Supply (February, 1974).

REASONS FOR GRANTING THE WRIT

The granting of the petition for certiorari in this case is supported by several of the grounds that are traditionally deemed sufficient by this Court to warrant plenary review.

1. The five Courts of Appeals which have considered industry challenges to implementation plan approvals by EPA have announced sharply conflicting holdings on the questions of whether and when the issues of necessity, economic impact and technical feasibility may be raised by affected persons.

The Eighth Circuit, standing alone, has held that these issues need not be examined by EPA, and are not reviewable in a federal court. In contrast, the remaining four circuits have held that these issues must be considered by EPA at some point, and that EPA's action thereon is judicially reviewable. However, the four circuits have divided on the issue of when these factors should be considered by EPA.

The Third and Fourth Circuits have held that economic and technical factors must be considered by EPA in the implementation plan approval process. *St. Joe Minerals Corp.* v. *Environmental Protection Agency,* 508 F.2d 743, 747 (3d Cir. 1975); *Appalachian Power Company* v. *Environmental Protection Agency,* 477 F.2d 495, 505 (4th Cir. 1973). As the Court stated in *Duquesne Light Co.* v. *EPA,* 481 F.2d 1 (3d Cir. 1972),

> "The Court finds that to expose the companies to the risk of punishment without affording them a full occasion to express their objections to the state implementation plan is fundamentally unfair." (481 F.2d at 10)

In contrast, the decision below held that "Congress intended to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan." (515 F.2d at 215)

The two other Circuits which have considered the issue have agreed that technological feasibility and economic impact are factors which must be considered by EPA under the Clean Air Act, but held that these issues may be heard by EPA and by the Federal District Courts only in enforcement proceedings rather than at the approval stage. *Indiana & Michigan Electric Company* v. *Environmental Protection Agency,* 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power Company* v. *Environmental Protection Agency,* 481 F.2d 162, 165 (6th Cir. 1973). These holdings are directly in conflict with the decision below, which held that no judicial review of such matters is permissible, since such technological and economic considerations "are not appropriate for a judicial resolution but are essentially legislative judgments as to where the public interest lies." (515 F.2d at 219). This rationale is totally at odds with fundamental concepts of reviewability, the Administrative Procedure Act, and decisions of this Court.

Thus, three different, conflicting interpretations of the statutory scheme have emerged from the foregoing decisions of the five Circuits. This conflict constitutes a substantial reason why certiorari should be granted.

2. The decision below is inconsistent with Congressional policy. EPA's position in the foregoing cases has been that under Section 116 of the Act[2] the states may adopt plans more stringent than necessary,

[2] 42 U.S.C. § 1857d-1.

and thus that EPA has a passive role in reviewing state plans. This interpretation flies in the face of the statute. For example, under Section 110(a)(2)(A)(i) of the Act, EPA must approve a plan which specifies a "reasonable time" for attainment of secondary standards, and the agency's own regulations include consideration of available technology in defining what is "reasonable."[3] Under the 1974 Amendments to the Act, EPA was expressly directed by Congress to review all state implementation plans to determine whether their requirements can be made less stringent without interfering with the national air quality standards.[4] Further, although Section 116 allows states to promulgate requirements more stringent than necessary, nothing in the Act authorizes such provisions to be approved by EPA and thereby to become part of the Federal implementation plan."[5] EPA's role cannot be overemphasized. Once approved by the Administrator, an implementation plan becomes a Federal requirement and may be civilly and criminally enforced by EPA under Section 113 of the Act and by private citizens under Section 304 of the Act.[6]

[3] 42 U.S.C. § 1857c-5(a)(2)(A)(i); see 40 C.F.R. § 51.13(b)(2). The latter regulations are binding on the states; we submit that EPA should examine whether the states have followed these provisions.

[4] 42 U.S.C. § 1857c-5(a)(3)(B). This provision expressly adopted to make clear Congress' policy by which "conversions to the burning of coal can be effectuated more readily," by electric power plants and other fuel burning stationary sources. H. Conf. Rep. 93-1085, 93d Cong., 2 Sess. 40 (1974).

[5] *See* 42 U.S.C. § 1857c-5(d) State standards become part of an "implementation plan" only when approved by EPA.

[6] 42 U.S.C. §§ 1857c-8, 1857h-2. *See* Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972); U.S. Steel Corp. v. Fri, 364 F.Supp. 1013 (N.D. Ind. 1973).

3. The decision below creates the unique situation that an agency of the Federal government must approve a state implementation plan and proceed to enforce it without ever having to justify its content. This construction of the Act means that any set of emission limits in a state implementation plan, no matter how arbitrary or unfounded they may be, must be approved by the EPA Administrator and complied with by affected industry sources.

The issue raised here cannot be left unresolved. If the EPA Administrator adopts the position of the decision below in other Circuits where this issue has not been decided, it will be possible for the Administrator simply to say that he does not know whether there is any justification for the requirements in a state implementation plan, but that it is the law, and is subject to Federal as well as state enforcement. Such a position does great disservice to the public, to those affected industries who seek to comply with the law, and to those who in good faith disagree. The decision below deprives affected industries of any opportunity to challenge the requirements in a state implementation plan which was developed without scientific evidence of need, or which is unrealistic in view of the timetables involved or the availability of pollution control technology.

The illogic of EPA's position is reflected in the facts of the *St. Joe Minerals* case, *supra.* There, after a remand to EPA by the Court of Appeals, the Administrator issued an explicit finding that the Pennsylvania emission limitation for sulfur oxides was not technologically feasible as applied to zinc smelters. However, the Administrator took the position that he did not have the power to disapprove a state implementation plan provision simply because it was technologically infeasible, despite the fact that Pennsylvania had adopted the standard in question without evaluating either its technical or economic feasibility or whether the standard was necessary in order to achieve ambiant air quality standards.

4. The decision below involves a question of continuing importance under the Clean Air Act which should be settled by this Court. In its response to the petition, EPA acknowledged that this Court should review this case and the decision of the Third Circuit in *St. Joe Minerals, supra,* No. 74-1650.[7] In its petition for certiorari in *St. Joe Minerals, supra,* (at 9-11) EPA asserts that the legal issues involved in these cases are still significant in that the agency will be taking further action to revise approved plans that have not in fact resulted in attainment of the national standards, will adopt national standards for additional pollutants or revised standards for those covered by existing standards, and will be considering variances and other revisions it reviews which would occasion further plan approvals.

CONCLUSION

The Administrator's construction of the Act, upheld by the Court below, means that any emission limitations or other requirements in a state implementation plan, no matter how irrational or unfounded they may be, may and must be mindlessly approved by the Administrator as Federal law, thus exposing affected sources to penalties under the Clean Air Act for vio-

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[7] There is a suggestion by the parties that the *St. Joe Minerals* case may have become moot. If so, review of the decision below by this Court takes on added importance.

lations and to citizens suits in the Federal courts for enforcement of the regulations, without an opportunity for Federal judicial review of the validity of the requirements. This is an intolerable and illogical result which, we submit, was not intended by Congress in enacting the Clean Air Act, and which conflicts with the holdings of four Circuits which have considered the issue.

It is respectfully submitted that the decision below was erroneous on questions of great importance to the electric utility industry, and to other industries affected by state implementation plans. Review by this Court is essential.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF FOR COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION AS AMICUS CURIAE

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Coalition for the Environment, St. Louis Region, respectfully moves for leave to file the accompanying brief *amicus curiae* in this case. The consent of the attorneys for the respondent and the intervenor-respondents has been obtained. The attorneys for the petitioner have declined to consent, as they did in the Eighth Circuit.

1. The Coalition for the Environment, St. Louis Region (hereinafter Coalition) is a corporation organized and existing under the Illinois not-for-profit corporation laws, with its principal office in St. Louis County, Missouri. The Coalition is a membership organization, composed of approximately 30 affiliated member organizations and approximately 800 individual members, residing in both Missouri and Illinois. Its purposes include strengthening the efforts of its members in seeking to improve and preserve the air quality of the St. Louis Region. Through its member organizations, the Coalition represents the environmental concerns of thousands of people residing in the St. Louis region.

2. The Coalition has a direct, and active, interest in this litigation. For the last six years the Coalition has actively taken part in various hearings and meetings concerning problems of air pollution control in the St. Louis Region. The Coalition regularly attends meetings of intervenor-respondent Air Conservation Commission of Missouri, and testifies at public hearings of that agency relating to air pollution control in the St. Louis region. At the statutory hearing conducted by the Missouri Air Conservation Commission on the adoption of the implementation plan which is the subject of the petition for review in this case, on January 5, 1972, the Coalition testified in support of the public interest, and promised to assume the role of community monitor of enforcement of the plan (Tr. 69-72). The Coalition filed a brief amicus curiae, and participated in the oral argument, in the court below; the Coalition's brief presented an analysis of the issues different from that presented in any of the other briefs, and the Coalition's analysis ultimately formed the principal basis of the opinion of the court below. The matters which petitioner is attempting to raise in this proceeding are matters of great public interest and of great concern to the Coalition and to those members of the public who are associated with the Coalition in a voluntary capacity to defend the public interest in clean air in the St. Louis region.

3. Not having seen the briefs for the respondent or the intervenor-respondents, the Coalition cannot state with certainty that the facts and questions of law presented in the accompanying brief will not be adequately presented by the parties. The Coalition doubts that they will be, for two reasons: First, experience in the court below indicates that respondent and intervenors are likely to approach the case, and analyze the issues, in a manner different from that of the Coalition. Second, experience generally, and the Clean Air Amendments of 1970 themselves, indicate that the voice of the public should be heard at every stage of proceedings under the Clean Air Act, in addition to the voices of industry and the governmental agencies, because the governmental agencies cannot be expected to view the issues in the same light as the public.

4. Specifically, Congress has emphatically expressed its concern in recent years that organizations like the Coalition, representing the public, be heard at all appropriate stages of proceedings to control air and water pollution. Congress has repeatedly recognized that the perspective, and the views, of a public-interest organization such as the Coalition will often vary from, and sometimes conflict with, the perspective and the views of the governmental agencies charged with administering the legislative program. In the Clean Air Amendments of 1970, the Water Pollution Control Act of 1972, and other recent legislation, Congress has exhibited a healthy skepticism of the administrative agency as the sole guardian of the public interest. See authorities cited in Part III of the accompanying brief.

5. The Coalition is represented in this case by counsel experienced in matters of air pollution control. He served as the first chairman of the Missouri Air Conservation Commission from 1965 to 1969, and has remained active in the field of air pollution control since that time. The Coalition believes that its brief will aid the court in understanding the issues, and the public's view of the issues.

Wherefore, movant prays that this Court grant movant leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted

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No. 74-1542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and

JOHN C. DANFORTH, Attorney General of the State of Missouri, and
MISSOURI AIR CONSERVATION COMMISSION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Statutes Involved	2
Argument	3
I. The Clean Air Act, as amended, does not authorize or require EPA to disapprove Missouri's Sulfur Dioxide Emission Regulation simply because it is more stringent than necessary to attain federal ambient air quality standards (if, indeed, it is)	3
A. The statutory framework	3
B. This petition for review presents no issue cognizable in this statutory proceeding	5
C. The congressional purpose to place primary responsibility for air pollution control in the states should be fulfilled	11
II. Petitioner has not exhausted the available administrative remedies	13
III. The right of the public, and particularly this amicus curiae, to participate in any further proceedings should be carefully preserved	17
Conclusion	19
Appendix—Section 110(a)(2), Clean Air Act as Amended, 42 U.S.C. § 1857c-5(a)(2)	A-1

TABLE OF AUTHORITIES

Cases

Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973)	8

Brown v. EPA, 521 F. 2d 827 (9th Cir. 1975) 11

Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973) 15, 17

Friends of the Earth v. EPA, 499 F. 2d 1118 (2d Cir. 1974) 5, 7

Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972) 6

Natural Resources Defense Council v. EPA, 478 F. 2d 875 (1st Cir. 1973) 5, 18

Natural Resources Defense Council v. EPA, 483 F.2d 690 (8th Cir. 1973) 5, 18

Natural Resources Defense Council v. EPA, 484 F.2d 1331 (1st Cir. 1973) 17

Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir. 1974) 17

Train v. NRDC, 421 U.S. 60 (1975) 4, 6, 12, 15, 16

West Penn Power Co. v. Train, 522 F.2d 302 (3d Cir. 1975) 15

Statutes

R.S.Mo. § 203.110 et seq. 14, 18

33 U.S.C. § 1251 et seq. 18

42 U.S.C. §§ 1857c-5(a)(2) and 1857d-1 ....2, 6, 10, 12

42 U.S.C. § 1857c-5(c) 12

42 U.S.C. § 1857c-5(f) 16

42 U.S.C. § 1857h-5-(b)(1) 2, 5, 18

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Coalition for the Environment, St. Louis Region (hereinafter Coalition), as amicus curiae, submits this brief in sup-

port of the decision below, together with a motion for leave to file this brief. The interest of the Coalition is set forth in detail in the motion.

STATUTES INVOLVED

Section 307(b)(1) of the Air Quality Act of 1970 is set forth at page 2 of petitioner's brief. Sections 110(a)(2) and 116 of the Act, 42 U.S.C. 1857c-5(a)(2) and 1857d-1, are equally involved in this proceeding. The former is set forth in the appendix of this brief, and the latter is quoted at p. 10, *infra*.

ARGUMENT

I. The Clean Air Act, as Amended, Does Not Authorize or Require EPA to Disapprove Missouri's Sulfur Dioxide Emission Regulation Simply Because It Is More Stringent Than Necessary to Attain Federal Ambient Air Quality Standards (if, Indeed, It Is).

A. The statutory framework

The petition for review was filed in the court of appeals under Section 307(b)(1) of the Clean Air Act, as amended, 42 U.S.C. 1857h-5(b)(1). It is a petition for review of the Administrator's action in approving a Missouri "implementation plan," a plan to achieve the desired goal of clean air.

Thus, the action which the court of appeals is empowered by Section 307(b)(1) to review is the action taken by the Administrator under Section 110 of the Act, 42 U.S.C. 1857c-5 (a)(2), in approving the Missouri plan. That section (set forth in the Appendix, *infra*) provides that "The Administrator *shall* approve such plan" if he determines certain specified facts. Those facts may be imprecisely, but sufficiently for present purposes, summarized as follows:

1. The plan can be expected to attain federal primary air quality standards as expeditiously as practicable, and federal secondary standards reasonably quickly;

2. The plan includes emission limitations and time tables sufficiently stringent to insure that these goals will be achieved;

3. The plan provides for appropriate monitoring procedures;

4. The plan provides for appropriate review of location of new major sources;

5. The plan provides for intergovernmental cooperation;

6. The plan provides assurances of necessary funding, requirements of monitoring devices, periodic reports, and emergency contingency authority;

7. The plan provides for inspection and testing of motor vehicles;

8. The plan provides for revision to make it more stringent, if such revision should become necessary; and

9. The plan was adopted by Missouri after reasonable notice and public hearings.

> "[P]lainly . . . [the Administrator] is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 100(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. NRDC*, 421 U.S. 60, 79 (1975) (emphasis in original).

To set aside the Administrator's approval of the plan, on a petition for review, the court of appeals presumably must find that his approval was arbitrary and capricious. See, *e.g.*, *Friends of the Earth v. EPA*, 499 F. 2d 1118, 1123 (2d Cir. 1974); *Natural Resources Defense Council v. EPA*, 478 F. 2d 875, 881 n.6 (1st Cir. 1973). However, the standard of review is of less significance at this point in the proceedings than the scope of the review. At the very least, the court of appeals would have to find that the Administrator's approval was incorrect, because his determination of one or more of the above factors was erroneous.

Accordingly, in order to state a claim under 42 U.S.C. 1857 h-5(b)(1), on grounds arising more than 30 days after the Administrator approved the plan, the petition for review apparently must allege matters which, if they had been in existence and had been known to the Administrator at the time he approved the plan, would have prevented him from determining one of the above factors. These are the kinds of matters considered by the courts in such cases as *Natural Resources Defense Council v. EPA*, 483 F. 2d 690 (8th Cir. 1973); *Natural Resources Defense Council v. EPA*, 478 F. 2d 875 (1st Cir. 1973). The jurisdiction of the court of appeals, in this narrow statutory proceeding, is limited to a claim of matters which would have prevented the Administrator from determining one or more of those factors, or a claim of violation of some other statute, such as the Administrative Procedure Act or the National Environmental Policy Act. This is, after all, as the court below pointed out (515 F. 2d at 212), a petition for review, not an original proceeding in the federal court of appeals.

B. **This petition for review presents no issue cognizable in this statutory proceeding**

In paragraphs 20 through 26 of its petition for review (App. 6-8, 13-14), Union Electric purports to set forth its grounds

for its petition. In general summary, Union Electric is alleging matters relating to its own individual problems respecting technical and economic feasibility of compliance with Missouri's emission limitations, and is urging that Missouri's emission limitations are more stringent and more expensive than are needed to achieve the federal air quality goals. (Petitioner also alleges that some regulatory commissions would not approve the expenditures needed for compliance (Petition Para. 24, App. 7); that allegation is not only irrelevant, but is entirely hypothetical, and not ripe for presention in any proceeding in which it might be relevant.)

None of the grounds asserted by petitioner is relevant in any way to the factors to be determined by the Administrator under 42 U.S.C. 1857c-5(a)(2). Even if the points alleged were true, and had been true at the time of the Administrator's approval, and had been brought to his attention, none of them would even justify, much less require, disapproval of Missouri's implementation plan.

In some circumstances, a claim of economic or technical infeasibility would be relevant to the Administrator's determination of the question whether the state plan "provides for the timely attainment . . . of ambient air standards." *Train v. NRDC*, 421 U.S. at 79. For example, when a state specifically regulates the *means* or *methods* by which emissions are to be reduced, rather than adopting regulations in terms of *performance*, economic and technical feasibility become relevant factors. This distinction can be illustrated by the following examples.

In *Getty Oil Co. v. Ruckelshaus*, 467 F. 2d 349, 353 (3d Cir. 1972), the Delaware Water and Air Resources Commission apparently had adopted a regulation limiting the sulfur content of fuel used with specified equipment in specified locations. The regulation apparently did not, like Missouri's Regulation X, give the industry the choice of means to limit emissions, but prescribed the specific means to be used: low-sulfur fuel. In determining whether the Delaware scheme would provide for the timely attainment of ambient air standards, the Administrator would have to consider (at least if the question is raised) such questions of technical feasibility as whether the low-sulfur fuel is available, and whether it could be burned in the specified equipment without clogging or damaging the equipment, and similar technical questions. If the fuel simply wouldn't function properly, then Delaware would have to permit the use of alternative means to reduce emissions, or adopt more stringent regulations for other sources, in order to attain the ambient air standards.

Or consider the New York scheme to control carbon monoxide and other pollutants emitted by automobiles, at issue in *Friends of the Earth v. EPA*, 499 F. 2d 1118, 1121 (2d Cir. 1974). Among other things, New York required retrofitting of light-duty vehicles with catalytic converters. In determining whether such retrofitting would reduce emissions as much as was predicted, and whether the New York plan would thereby provide for the timely attainment of ambient air standards, the Administrator would have to consider whether the technology has in fact attained the degree of effectiveness ascribed to it. If not, New York would have to make other provisions to attain the prescribed goal.

Alternatively, let us assume that Delaware, instead of limiting the sulfur content of fuel, had required installation of sulfur removal processes on power plant stacks. In determining whether such a regulation would provide for the timely attainment of ambient air standards, the Administrator would have to consider whether the technology has attained a degree of effectiveness which would bring about the needed reduction (if any) of emissions; technological feasibility would be the primary issue before the Administrator. If he determined that the sulfur removal processes would not be sufficiently effective, he would be

required to disapprove the plan (not the regulation), because the plan will not achieve the desired goals. "If he finds [the plan] reasonably unlikely to achieve such results within the fixed time-tables, whether for technological or economic reasons, or otherwise, he should reject the plan and return it to the state authorities with instructions to consider alternative procedures that might meet the statutory requirements as established by the Administrator." *Appalachian Power Co. v. EPA*, 477 F. 2d 495, 506 (4th Cir. 1973).[1]

Missouri, however, has been careful to draw up its regulations in terms of *performance*, leaving the industrial sources free to use whatever means they think best to achieve the required reduction (if any) of emissions. Regulation X, effective March 24, 1967, provides that no person may cause the emission of sulfur dioxide from a large power plant "in an amount greater than 2.3 pounds of sulfur dioxide per million" BTU. The utilities are free to choose any method they desire to achieve that maximum: change to low-sulfur coal, low-sulfur oil, natural gas, nuclear or other sources of power, or clean the coal before combustion, or add reagents in the combustion process, or remove the sulfur dioxide from the gas flow after combustion, or anything else.

Thus, it cannot rationally be argued that, because of economic or technological difficulties, Missouri should have devised some

[1] Note that a determination by the Administrator that the technology of sulfur dioxide removal processes is not yet proved would not simply lead to a disapproval of the specific requirement, and an approval of the remainder of the plan, which is what the petition for review seeks (App. 8). On the contrary, the entire plan (at least insofar as it was directed toward sulfur dioxide) would be disapproved. Delaware would be required to develop another plan to reduce the ambient air concentrations of sulfur dioxide—for example, more stringent controls on other sources of sulfur dioxide. Having done so, Delaware could still require the installation of sulfur dioxide removal processes on large power plants, notwithstanding the Administrator's skepticism as to their effectiveness. The situation would be analogous to that posited by the Appalachian *amicus curiae*, at p. 17 of their brief.

alternative regulation for large power plants, to provide for the timely attainment of ambient air standards. And petitioner is not presenting any such argument. On the contrary, petitioner alleges that its individual compliance with Missouri's regulations is not necessary to achieve the federal goals; in short, that Missouri's regulations are more stringent than federal law requires. That is apparent from the petition for review (para. 26, App. 13-14), and a reading of petitioner's brief. At the oral argument before the court of appeals, this was candidly[2] conceded by petitioner's counsel:

> The Court: "Yes, in some kinds of cases, but that relates back to 1857c-5, which appears to indicate that the Administrator is required to approve plans if he determines certain things. Here, as I understand it, you're not contending that the plan doesn't contain these things, what you're saying is the requirements are too strict and too severe.
>
> Mr. Ferrell: That is true, your Honor." (Tape recording of oral argument, in custody of Clerk, Eighth Circuit Court of Appeals, St. Louis, Mo.)

[2] Petitioner's supporting *amici* have obfuscated the issue considerably. Thus Edison Electric Institute blithely restates the Question Presented (p. 2):

> ". . . whether—*under any circumstances*—technological and economic factors are relevant to the Administrator's approval of a state implementation plan . . ." (italics in original).

The Coalition trusts that this Court need not be reminded that the issue is whether, *under the circumstances of this case, on this record, this petition for review* alleges any facts which would have caused the Administrator to disapprove Missouri's Regulation X.

The other *amici* have obfuscated in a more sophisticated manner, but all have set up the same straw man, and knocked it down. All have pointed out that in some situations questions of economic and technological feasibility are relevant to the Administrator's determination. Of course that is correct, when the considerations suggested will tend to show that the state implementation plan will not provide for the timely attainment of air quality standards. But it is

Assuming, arguendo, that petitioner is correct in stating that Missouri's regulations are more stringent than required to meet the federal ambient air standards, that fact would not justify disapproval of the plan by the Administrator. If the Administrator determines that Missouri's plan is sufficiently stringent to meet the minimal federal goals, he "*shall* approve such plan," whether or not it is more stringent than federal law requires. In Section 116 of the 1970 Act, 42 U.S.C. § 1857d-1, Congress expressly provided:

> "Except as otherwise provided in sections 1857c-10(c), (e), and (f), 1857f-6a, 1857f-6c(c)(4), and 1857f-11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c-6 or

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not correct, when the considerations will *not* tend to show that, as in this case. The amici have ignored the difference between performance regulations and means regulations.

All three *amicus* briefs (unlike petitioner's brief) have also ignored the record in other respects. All three argue that the economic and technological evidence (supposedly showing that petitioner cannot or will not comply with Regulation X) is relevant when the Administrator determines whether the ambient air quality standards will be attained within the time prescribed by Congress (Appalachian brief 14, 17; Edison brief 2-3; Pacific Legal Foundation brief 13). But the amended petition for review alleges (and it has not been denied) that those standards will be attained in good time even if petitioner does not comply with Missouri's Regulation X (App. 13-14). Taking the allegation as true, on this record, the straw man collapses before the *amici* can even knock it down. In elucidating a new and complex statute, regulating conduct which has complex physiological, as well as economic and technological, aspects, the courts should proceed with care. It is sufficient to decide the case presented by this record, without trying to decide other cases.

> section 1857c-7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

As Union Electric's vice-president, Earl K. Dille, correctly assured the Missouri Air Conservation Commission at the statutory public hearing on adoption of this implementation plan, on January 5, 1972: "If the people of this metropolitan area want to spend a quarter of a billion dollars to reduce anticipated ground-level SO_2 concentrations in the vicinity of Labadie from .0024 parts per million to .0004 parts per million, it is their decision to make." (Transcript, page 56). Thus, petitioner's claim is wholly outside the purview of the federal legislation, and outside the scope of review of the court of appeals.

C. The congressional purpose to place primary responsibility for air pollution control in the states should be fulfilled

The Air Quality Act of 1967, the Clean Air Amendments of 1970, and the partially parallel bill, the Water Pollution Control Act of 1972, were extraordinarily innovative efforts in two fundamental respects:

1. As indicated in Part III of this brief, they reflected a deep and growing mistrust of governmental administrative agencies as guardians of the welfare of the people, and provided detailed procedures by which private citizens can take an active part in the enforcement of these laws; and

2. In an effort to uphold the federal interest in clean air and clean water, while arresting the flow of authority and responsibility to the federal government, they devised a new and "elaborate form of cooperative federalism." *Brown v. EPA*, 521 F. 2d 827, 835 (9th Cir. 1975). Congress felt compelled to as-

sure that a minimum level of cleanliness would be achieved in our ambient air, and our national waters. But Congress "explicitly preserved the principle: 'Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .'" *Train v. NRDC*, 421 U.S. 60, 64 (1975). To that end, Congress "left to the States considerable latitude in determining how the [ambient air quality] standards would be met." 421 U.S. at 87.

The intermeshing of federal and state regulatory agencies is a novel one. It will be extremely difficult to administer. No doubt it will need much tinkering and many modifications. But it is a real, and serious, effort, doubtless arising in substantial measure from Senator Muskie's years of work with, and oversight hearings on, the 1963 and 1967 Clean Air Acts, and his years of active interest in the Advisory Commission on Intergovernmental Relations. This effort to develop a new form of cooperative federalism should be hospitably received in this Court.

The result advocated by petitioner, and by supporting *amici curiae*, would snuff out this first faint flicker of hope of restoring to the states a responsible role in regulatory matters of national concern. If petitioner's plaints must be heard on this petition for review (and if we assume they can be proved true), then the result must be that the federal Administrator must *disapprove* the Missouri Regulation X. 42 U.S.C. § 1857c-5 (a)(2). Unless Missouri manages to replace Regulation X with some other regulation, satisfactory to the Administrator, the Administrator must then promulgate his own alternative regulation, which has the force of law. 42 U.S.C. § 1857c-5(c). Under the Supremacy Clause, it seems clear that the disapproved Missouri Regulation would no longer be effective.[3]

[3] We do not understand petitioner to argue otherwise; indeed, it is the essence of petitioner's case that petitioner seeks to be relieved of the strictures of Regulation X. The suggestion in the *amicus* brief of Appalachian Power Co., et al. (page 37) that Missouri can have one set of emission limitations which are a part of the implementation plan, and simultaneously a second (different, more stringent) set which "would be *outside* of the implementation plan," is without merit. Even if we ignore the Administrator's "disapproval," and the United States Constitution, such a dual set of emission limitations boggles the mind. Which set would a specific company comply with? Can it be seriously supposed that Congress intended the state to promulgate one set of emission limitations, for the purpose of showing it to the Administrator to gain federal approval of the implementation plan, and at the same time to maintain in the background a different set of emission limitations, which the state really intends to enforce? If the Administrator happened to learn about the second set, would he not be concerned about them? Would he not be compelled to concern himself with them, in order to predict what is likely to happen to the ambient air in that state, in order to determine whether the state will really attain the desired goals in the specified time?

The legislative history set forth at pages 36-37 of the *amicus* brief does not indicate that Congress intended any such dual set of limita-

Thus, the federal administrator would be denying the states the right to enforce their desired emission limitations, contrary to the express guaranty of § 1857d-1, simply because, for example, he concludes that compliance would be unduly expensive for the complaining industry.

While Congress sought to preserve for the states the maximum flexibility, this Court, in reversing, would be putting a straitjacket on the states, requiring conformance to exactly that specific regulation deemed best by the Administrator.

Accordingly, the court below properly dismissed the petition for review.

II. Petitioner Has Not Exhausted the Available Administrative Remedies.

Petitioner has co-existed peacefully (more or less) with Missouri's Regulation X since March 24, 1967, by invoking the

variance procedure. The Missouri statute expressly authorized the granting of a "variance" under the circumstances alleged by petitioner:

> "The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance." § 203.110(1), R.S. Mo.

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tions. On the contrary, the term "implementation plan" was well established before the 1970 Act. The Air Quality Act of 1967, P.L. 90-148, 81 Stat. 485, called for "plans for implementation" of air quality standards in §§ 106(a), 108(c)(1). In Guidelines for the Development of Air Quality Standards and Implementation Plans, published in May, 1969, by EPA's predecessor in air pollution control, the Department of Health, Education and Welfare, the term is defined (Section 1.52):

> "An implementation plan is a blueprint of the steps that will be taken to insure attainment of an air quality standard within a reasonable time. It includes *all* the steps to be taken to abate and control pollutant emissions from existing sources in an air quality control region and to prevent urban and economic growth from adding to a region's air pollution problems." (Emphasis added.)

Appalachian Power Co. is accustomed to keeping two (or more) sets of accounts, but Missouri cannot have two divergent sets of emission limitations existing side by side.

Time and again, petitioner has renewed its variances. Indeed, another application for renewal was pending, when this petition for review was filed, before the Missouri Air Conservation Commission (and one before the St. Louis County Air Pollution Control Appeal Board) (App. 5). Since petitioner maintains that its emissions do not have the effect of continuing a "health hazard," nothing appears to stand in the way of further renewal.

Why, then, was this petition filed in 1974, after seven years of peaceful co-existence? Apparently petitioner looked apprehensively at the approaching date of May 31, 1975; for periods after that date, the Eighth Circuit (like the First, Second, and Fifth) had shot down the variance procedure, as noted by this Court in *Train v. NRDC, supra*. This foreboding generated the spectre of gloom and doom which haunts the petition for review, and which was trotted out before the court of appeals. That spectre, of course, has been banished by the decision in *Train v. NRDC*, 421 U.S. 60 (1975). But petitioner plunges on, and "turns no more [its] head." To play out the remainder of this litigation before this Court now, after *Train v. NRDC* resuscitated the variance procedure in the Eighth Circuit, is like playing out *The Rime of the Ancient Mariner* without the albatross.

There is no reason to suppose that petitioner and the Missouri Air Conservation Commission cannot continue to find an accommodation satisfactory to them and to the Environmental Protection Agency. And even if that accommodation could not be achieved, there is no basis for an assumption that the Administrator would bring an enforcement action against petitioner; the decision to bring an enforcement proceeding, unlike the notice of violation, lies in the discretion of the Administrator. *E.g., West Penn Power Co. v. Train*, 522 F. 2d 302, 310 (3d Cir. 1975). Petitioner's plaints are exceedingly prematur[e].

Petitioner's brief relies heavily on the 1973 decision of the Sixth Circuit in *Buckeye Power, Inc. v. EPA*, 481 F. 2d 162

(6th Cir. 1973). More timely is the decision of the Sixth Circuit in *Buckeye II*, October 24, 1975, 8 ERC 1317, after this Court's decision in *Train v. NRDC, supra*. Buckeye, like petitioner, asked the court of appeals to set aside the Administrator's approval of a state implementation plan on the ground that compliance was economically and technically infeasible. The Sixth Circuit ruled:

> "Our conclusion is that the disputes which petitioners seek to have this court resolve are being worked out at the state agency level where the EPA statute, as construed by the Supreme Court, clearly contemplates they should be . . . Since the record now before us demonstrates that these processes of adjustment are presently proceeding exactly as, and where, the statute contemplated, and that no final resolution as to them has been arrived at, this case is not presently ripe for judicial review." 8 ERC at 1319, 1320.

The variance procedure is not the only remedy available. The 1970 Act, at 42 U.S.C. Section 1857c-5(f), provides another procedure to deal with the circumstances alleged by Union Electric: that the necessary technology is not available, that interim control measures have reduced the impact of Union Electric's plants on public health, and that the continued operation of Union Electric's plants is essential to the public health or welfare. Under those circumstances, the Governor of Missouri may apply to the Administrator to postpone the applicability of the requirements of the plan, as to Union Electric's plants. If those circumstances really exist, then the Administrator must grant a postponement. One cannot assume that the Governor (if he takes these allegations seriously) would be totally insensitive to the predicted "national catastrophe," and would refuse to make such an application.

Other remedies may also be available. Perhaps Union Electric's arguments could be advanced as a defense in an enforce-

ment proceeding brought by the Administrator, as indicated in *Buckeye I*, 481 F. 2d 162, 173 (6th Cir. 1973). If the Missouri regulations are as unreasonable as Union Electric would have them appear to be, perhaps Union Electric can bring a suit in a court of *nisi prius* jurisdiction to have them set aside as violating the Fourteenth Amendment. But the administrative review, in this narrow statutory proceeding, is limited to the factors listed in the statute as a basis for the approval of the plan by the Administrator, and the Administrator's compliance with other statutes. The court of appeals has not been instructed by congress to investigate and remedy all wrongs, real or fancied, of which petitioner might complain.

III. The Right of the Public, and Particularly This Amicus Curiae, to Participate in Any Further Proceedings Should Be Carefully Preserved.

If, somehow, this Court should reverse, and order some further proceedings, the Coalition respectfully urges that this Court, in writing an opinion, take especial care to guard the rights of public participation which Congress sought to guarantee, in the Clean Air Amendments of 1970.

In that Act Congress has clearly expressed its belief that public participation in the establishment and the revision of air quality standards is essential. The 1970 Act "embraced the concept of 'citizen enforcement' of antipollution laws." *Natural Resources Defense Council v. EPA*, 489 F. 2d 390, 397 (5th Cir. 1974). See also *Natural Resources Defense Council v. EPA*, 484 F. 2d 1331, 1334 (1st Cir. 1973). The Act requires that states hold public hearings in both the promulgation and the revision of implementation plans (§ 110(a)(1) and (3), 42 U.S.C. § 1857c-5(a)(1) and (3)), that the Administrator provide opportunity for hearings on a Governor's application for postponement (§ 110(f)(2)(A), 42 U.S.C. § 1857c-5(f)(2)(A)), and

that any interested person may seek judicial review of such a postponement (§ 110(f)(2)(B), 42 U.S.C. § 1857c-5(f)(2)(B)). Furthermore, the Act provides for citizen suits (§ 304, 42 U.S.C. § 1857h-2) and the courts have allowed public interest groups to bring a petition to review the Administrator's approval of a state implementation plan under § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1). *E.g., Natural Resources Defense Council v. EPA*, 483 F. 2d 690 (8th Cir. 1973); *Friends of the Earth v. EPA*, 499 F. 2d 1118 (2d Cir. 1974).

Further references to public participation may be found in the following sections of the Clean Air Act: §§ 103(e), 109(a)(1)(B), 110(a)(3), 111(b)(1)(B), 112(b)(1)(B), 114(c), 115(d)(1), 115(f)(1), 117(a)(1), 42 U.S.C. §§ 1857b(e), 1857c-4(a)(1)(B), 1857c-5(a)(3), 1857c-6(b)(1)(B), 1857c-7(b)(1)(B), 1857c-9(c), 1857d(d)(1), 1857d(f)(1), 1857e(a)(1). As the Senate Committee reported, "The committee also was concerned that public participation, a unique feature of the Air Quality Act of 1967, should be preserved." S. Rep. 91-1196, 91st Cong., 2d Sess. page 2 (Sept. 17, 1970).

The Court's disposition of this matter will have precedential effect with respect to the federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* which closely parallels the Clean Air Act in many respects. The Water Pollution Act states in its "Declaration of Goals and Policy" that public participation "shall be provided for, encouraged and assisted." § 101(e), 33 U.S.C. § 1251(e). Section 509(b)(1) of that Act, 33 U.S.C. § 1369(b)(1), provides for judicial review of the Administrator's actions in terms similar to those found in § 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1).

It is relevant, also, that Missouri has recognized the value of public participation in the administration of its Air Conservation Law, Mo. Rev. Stat. § 203.010 *et seq.* The Missouri Air

Conservation Commission, the agency whose regulations are here challenged, is required to have among its members representatives of the general public (§ 203.040(1)) and must hold public hearings prior to the adoption, amendment or repeal of any standard, rule or regulation (§ 203.070(1)).

Thus, this Court is urged to insure that the state and federal agencies, and the lower courts, implement the salutary public policy, expressed by both the Congress and the Missouri General Assembly, that the public participate in any decision-making process concerning the environment. If any further proceedings (other than affirmance) ensue, the principle of public participation in the decision-making process, in cases directly involving the quality of the air we breathe, should be zealously protected by this Court, in keeping with the spirit of the federal and state legislation respecting air pollution control.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted

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APPENDIX

APPENDIX

Section 110(a)(2), Clean Air Act as Amended, 42 U.S.C. § 1857c-5(a)(2)

The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modifi-

cation) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1975.

Supreme Court, U. S.
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DEC 30 1975
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IN THE

Supreme Court of the United States

October Term, 1975
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UNION ELECTRIC COMPANY,

Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Amicus Curiae Brief of the State of California in Support of Respondent.

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SUBJECT INDEX

Page

Question Presented 1

Introduction 2

Interest of Amicus Curiae, State of California 6

Summary of Argument 8

Argument 11

I

In Reviewing the Validity of an EPA-Approved State Implementation Plan, the Court of Appeal May Not Consider Alleged Grounds of Economic and Technological Infeasibility. Infeasibility May, However, Be Considered at Other Stages During the Implementation of the Clean Air Act 11

A. Section 110(a)(2) Contains the "Relevant Factors" Defining and Limiting the EPA Administrator's Action in Approving State Implementation Plans 11

B. Section 110(a)(2) Contains the "Relevant Factors" Governing the Scope of Judicial Review in Section 307(b)(1) Cases 20

C. The Legislative History of the Clean Air Act Amendments of 1970 Demonstrates a Clear Congressional Intent to Preclude Considerations of Economic and Technological Feasibility From Interfering With the Timely Attainment of the National Ambient Air Quality Standards 23

Page

D. During the Formulation or Revision of State Implementation Plans, Economic and Technological Feasibility May Be Considered in Allocating Clean-Up Burdens Among Emission Sources or Classes of Sources 26

II

Economic and Technological Feasibility May Be Relevant to Support Extensions and Postponements or in Fashioning Compliance Schedules and Enforcement Orders 29

Conclusion 32

TABLE OF AUTHORITIES CITED

Cases Page

Big Rivers Electric Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975) 19, 20

Buckeye Power Inc. v. EPA, ... F.2d ...., [8 E.R.C. 1317] (6th Cir. 1975) 18

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 20

Duquesne Light Co. v. EPA, 481 F.2d 1 (3rd Cir. 1973) 14

Duquesne Light Co. v. EPA, 522 F.2d 1186 (3rd Cir. 1975) 14

Exxon v. New York City, 372 F.Supp. 335 (S.D. N.Y. 1974) 15

Firestone Plastics Co. v. U.S. Dept. of Labor, 43 L.W. 3625 (May 27, 1975) 19

Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972) 14

Indiana & Mich. Elec. Co. v. EPA, 509 F.2d 839 (7th Cir. 1975) 6, 18, 19

Kennecott Copper Corp. v. Train, ... F.2d .... (9th Cir. 1975) (Slip Opinion No. 75-1335 [Nov. 28, 1975]) 19

Oljata Chapter v. Train, 515 F.2d 654 (D.C. Cir. 1975) 21, 22

NRDC v. EPA, 478 F.2d 875 (1st Cir. 1973) 18

NRDC v. EPA, 507 F.2d 905 (9th Cir. 1974) 19

NRDC v. Train, 489 F.2d 390 (5th Cir. 1974) 19

Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301 (2nd Cir. 1975) 6, 19

State of Texas v. EPA, 499 F.2d 289 (5th Cir. 1974) 18, 19

St. Joe Minerals Corp. v. EPA, 508 F.2d 743 (3rd Cir. 1975) 14, 15, 16

Page

Train v. NRDC, 421 U.S. 60 (1975) 13, 17, 26, 27, 28, 31

Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir. 1975) 6, 23, 24

Statutes

Air Pollution Control Act of 1955 ..... 3, 4, 8, 10

Air Quality Act of 1967 ..... 3, 25

Clean Air Act & Amendments

§§ 107(a)—42 U.S.C.A. § 1857c-2(a) 26

110—42 U.S.C.A. § 1857c-5 ..... 2, 25

110(2)(2)—42 U.S.C.A. § 1857c-5(2)(2) 13

110(2)(2)(A)—42 U.S.C.A. § 1857c-5(2)(2)(A) 14, 17

110(a)(2)—42 U.S.C.A. § 1857c-5(a)(2) 1, 3, 4, 8, 9, 11, 13, 14, 16, 20, 21, 26

110(a)(2)(A)—42 U.S.C.A. § 1857c-5(a)(2)(A) 12, 16

110(a)(2)(B)—42 U.S.C.A. § 1857c-5(a)(2)(B) 12, 19

110(a)(2)(C)—42 U.S.C.A. § 1857c-5(a)(2)(C) 12

110(a)(2)(D)—42 U.S.C.A. § 1857c-5(a)(2)(D) 12

110(a)(2)(E)—42 U.S.C.A. § 1857c-5(a)(2)(E) 12

110(a)(2)(F)—42 U.S.C.A. § 1857c-5(a)(2)(F) 13

110(a)(2)(G)—42 U.S.C.A. § 1857c-5(a)(2)(G) 13

110(a)(2)(H)—42 U.S.C.A. § 1857c-5(a)(2)(H) 11, 13, 20

Page

110(a)(3)—42 U.S.C.A. § 1857c-5(a)(3) 30, 31

110(a)(3)(A)—42 U.S.C.A. § 1857c-5(a)(3)(A) 30, 31

110(a)(3)(B)—42 U.S.C.A. § 1857c-5(a)(3)(B) 16, 17, 22, 29

110(e)—42 U.S.C.A. § 1857c-5(e) 10, 16, 29

110(e)(1)(A)—42 U.S.C.A. § 1857c-5(e)(1)(A) 30

110(e)(1)(B)—42 U.S.C.A. § 1857c-5(e)(1)(B) 30

110(f)—42 U.S.C.A. § 1857c-5(f) 10, 30

110(f)(1)(A)—42 U.S.C.A. § 1857c-5(f)(1)(A) 30

110(f)(1)(B)—42 U.S.C.A. § 1857c-5(f)(1)(B) 30

110(f)(1)(C)—42 U.S.C.A. § 1857c-5(f)(1)(C) 30

110(f)(1)(D)—42 U.S.C.A. § 1857c-5(f)(1)(D) 30

111—42 U.S.C.A. § 1857c-6 ..... 12, 25

111(a)(1)—42 U.S.C.A. § 1857c-6(a)(1) 25

113—42 U.S.C.A. § 1857c-8 ..... 10, 31

113(a)(4)—42 U.S.C.A. § 1857c-8(a)(4) 31

116—42 U.S.C.A. § 1857d-1 ..... 15, 16, 26

201—42 U.S.C.A. § 1857f-1 2

304—42 U.S.C.A. § 1857h-2 16

307(b)—42 U.S.C.A. § 1857h-5(b) 8

307(b)(1)—42 U.S.C.A. § 1857h-5(b)(1) 1, 3, 9, 11, 20, 21, 29

Energy Supply and Environmental Coordination Act of 1974, Pub. Law No. 93-319 17

Page

California Assembly Bill 1758, Chapter 957, Stat. 1975, 1975-76 Reg. Leg. Sess. (Effective January 1, 1976) 6

Health & Safety Code

§§ 39606 6
40702 6
41507 6
41509 8
41601 6
41602 6
41703 7
42352(b) 7
42354 7
42355 7
42362 7
42402 7
42403 .....7, 8

Local Ordinances

San Diego County Air Pollution Control District, Rule 61 7
San Diego County Air Pollution Control District, Rule 63 7

Regulations

40 C.F.R. § 51.2(6) 27
40 C.F.R. § 51.2(d) 27
40 C.F.R. § 52.1332 16

Congressional Records

116 Cong. Rec. 16107 (1970) 27
116 Cong. Rec. 20598 (1970) 27
116 Cong. Rec. 32901 (1970) 2, 21
116 Cong. Rec. 32902 (1970) 2, 21

Hearings Page

Senator Eagleton, Hearings on Implementations of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92nd Congress, 2d session (1972 Senate Oversight Hearings) 25
Clean Air Oversight Hearings (1972) 24

Bills and Committee Reports

House Bill [H.R. 17255, 91st Cong., 2d Sess. (1970)] 23
House Report No. 91-1146, 91st Cong., 2d Sess. (1970) 24
Senate Bill [S-4358, 91st Cong., 2d Sess. (1970)] .. 23
Senate Report No. 1196, 91st Cong., 2d Sess. (1970) 16, 23

Miscellaneous

Petitioner's Brief, pp. 14, 22 .....21, 29
State Implementation Plan 7, 9, 10
.....11, 12, 13, 14, 15, 16, 21, 26

Articles

Bonine, John, "The Evolution of 'Technology Forcing' in the Clean Air Act", Bureau of National Affairs, Environmental Reporter Monograph No. 21 (July 25, 1975), p. 1 .....2, 5, 23, 24, 25
Comment, 6 Rutgers-Camden Law Journal 810 (1975) 28
Luneberg & Roselle, "Judicial Review Under The Clean Air Act Amendments of 1970", 15 B.C. Ind. & Com. L.R. 667 (1974) 32

IN THE

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Amicus Curiae Brief of the State of California in Support of Respondent.

Question Presented.

There are two components to the question presented by Petitioner for which this Court granted certiorari:

1. Whether the EPA Administrator is required, prior to approving a state implementation plan under Section 110(a)(2) of the Clean Air Act, to determine if any emission source will be unable to comply with the implementation plan's requirements due to technological or economic infeasibility;

2. Whether alleged grounds of technological and economic infeasibility may serve as a basis for judicial review, pursuant to Section 307(b)(1) of the Clean Air Act, of a state implementation plan approved by EPA under Section 110(a)(2).

Introduction.

A principal objective of the Clean Air Act Amendments of 1970 was to make it clear that industry must bear the responsibility for developing the technology necessary to achieve and maintain the national primary ambient air quality standards. As Senator Muskie, one of the sponsors, stated:

> "The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. . . . This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met."[1]

Widespread attention has already been drawn to the technology-forcing demands which Congress imposed on the automotive industry[2] to produce new cars which could meet tough emission standards by 1975 and which, at the time of their enactment in 1971, were beyond the range of apparent technological capability. Less attention, however, has been given to technology-forcing provisions of the Clean Air Act dealing with stationary industrial pollution sources.[3]

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[1]116 Cong. Rec. 32901-02 (1970).

[2]Title II, Clean Air Amendments of 1970, Sections 201 *et seq.;* 42 USC section 1857f-1 *et seq.*

[3]Title I, Clean Air Act Amendments of 1970, section 110, 42 USC sections 1857c-5 *et seq.;* John Bonine, "*The Evolution of 'Technology-Forcing' in the Clean Air Act,*" Bureau of National Affairs, Environment Reporter Monograph No. 21, page 1 (July 25, 1975) (hereafter cited as *The Evolution of Technology-Forcing*). *The Evolution of Technology-Forcing* article contains a thorough analysis of the shift in public policy during the 1950s and 1960s, which culminated with Congress imposing, in the 1970 Clean Air Act Amendments, the responsibility on industry to develop and perfect technology that would achieve and maintain clean air standards. The focus of the article is on the legislative history of the Air Pollution Control Act of 1955, the Clean Air Act of 1963, the Air Quality Act of 1967 and the 1970 Clean Air Act Amendments. Particular attention is given to an analysis of the committee hearings, committee reports and floor debates during enactment of the 1970 amendments, on the question of whether economic and technological feasibility must be considered in implementing the Clean Air Act.

This case raises for the first time to this Court the question of whether stationary sources of air pollution, such as fossil-fuel power plants, may attack the validity of technology-forcing air pollution standards, regulations or emission limitations, contained in state implementation plans, through the judicial review provisions of the Clean Air Act[4] on the grounds that, in approving plans containing such technology-forcing standards, the Environmental Protection Agency (EPA) failed to consider technological or economic feasibility of compliance. Technically speaking, the issue raised in this case is whether alleged grounds of technological and economic infeasibility, arising more than 30 days after EPA's approval of a state implementation plan, may serve as a basis for judicial review of the validity of such plan or requirement. Amicus curiae believes that the scope of judicial review under Section 307(b)(1) is the same whether alleged grounds of infeasibility existed prior to EPA's approval of the plan or arose more than 30 days later. The Court of Appeal can only review whether EPA considered the "relevant factors" set forth in Section 110 (a)(2). If new grounds arise more than 30 days after EPA's approval action, the Court of Appeal may

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[4]Clean Air Act Section 307(b)(1); 42 USC section 1857h-5(b)(1).

only consider those new grounds if they could have been considered by EPA, pursuant to Section 110(a)(2) (had such new grounds existed at the time the implementation plan was being reviewed for EPA approval). Therefore, amicus curiae's arguments will address the issue in this case from the broader standpoint of whether the EPA Administrator may disapprove state implementation plans based on grounds of technological or economic infeasibility (or whether a Court of Appeal may consider such infeasibility during judicial review of the Administrator's approval of a plan). Amicus curiae will also address the related questions of when and to what extent technological and economic infeasibility grounds may be raised during the implementation of the Clean Air Act.

What is really at stake in this case is the integrity of Congress' technology-forcing objective. If, as petitioners argue, the EPA Administrator must consider technological and economic feasibility of compliance in approving or disapproving state implementation plans (SIPs) (or if the Court of Appeal during judicial review of the Administrator's decision must consider such factors), then the Clean Air Act's technology-forcing objective will be effectively sterilized. This emasculation would result because technology-forcing standards or emission limitations typically envision a prescribed period of time in which a given pollution source or class of sources must use good faith efforts to develop and perfect technology which will enable timely compliance with the standard or emission limitation. Since the technology-forcing standards or emission limitations are, by definition, unachievable with control technology available at the time of their adoption,

it necessarily follows that if EPA (or the Courts of Appeal during judicial review of EPA approvals) must consider economic and technological feasibility of proposed technology-forcing standards or limitations at the plan approval stage, only those standards or emission limitations for which control technology is available (or virtually available) are likely to be approved and sustained during judicial review. Petitioner's arguments —that economic and technological feasibility of complying with standards and limitations must be considered at the plan approval stage (or at a later time, as grounds for invalidating a plan)—are really arguments that the development of new technology for controlling air pollution must proceed at a pace dictated by the pollution source, consistent with what that source perceives is economically and technologically feasible.[5] These arguments are contrary to the objectives of the Clean Air Act Amendments of 1970. The 1970 Amendments make it clear that public health considerations are paramount, and that the pace of technological development for controlling air pollution is to be dictated, not by the pollution sources, but by implementation plans which specify the degree of emission reductions necessary to achieve and maintain healthful air by the statutory deadline.

Considerations of economic and technological feasibility of compliance may, of course, be relevant at some point; they may become relevant at the point in time nearing the deadline for compliance when, despite demonstrable good faith efforts to develop effective control technology, such technology is still unavailable or is economically infeasible and the emission

[5]*The Evolution of Technology-Forcing*, 2, *supra*, note 3.

source is compelled to seek a variance to allow compliance later than the deadline. Such considerations may also become relevant during enforcement proceedings to structure compliance orders. Good faith effort by the emission source to develop effective control technology is the critical element in technology-forcing.[6] Good faith efforts to work in the future cannot be judged at the time the standard is adopted but only retrospectively, when the deadline for compliance nears or has passed.[7]

The Eighth Circuit's opinion below (*Union Electric Co. v. EPA*) correctly gauged this point and should be affirmed.

Interest of Amicus Curiae, State of California.

California's air pollution control law, recently recodified[8] provides local and regional air pollution control districts with authority to adopt and enforce, with respect to nonvehicular air pollution sources, rules and regulations necessary or proper to achieve and maintain state and federal ambient air quality standards.[9] The adoption of technology-forcing standards

[6]"[T]he absence of demonstrable good faith efforts toward compliance should serve to dampen any enthusiasm for technological and economic [feasibility] arguments." *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975).

[7]In this regard, the economic and technological feasibility of an emission standard cannot be predicted or determined until after an affected industry has made concerted good faith efforts to develop the necessary technology. *Society of Plastics Indus., Inc. v. OSHA*, 509 F.2d 1301, 1309 (2nd Cir. 1975), *cert. denied sub nom. Firestone Plastics Co. v. U.S. Dept. of Labor*, 43 LW 3625 (May 27, 1975).

[8]California Assembly Bill 1758, Chapter 957, Statutes of 1975, 1975-76 Regular Legislative Session (effective January 1, 1976).

[9]California Health and Safety Code sections 39606, 40702, 41507, 41601, 41602.

and limitations is authorized by state enabling legislation.[10] Provisions governing the issuance of variances from compliance contemplate that the affected pollution sources demonstrate good faith efforts to comply.[11]

California's interest in this case is to seek legal clarification and assurance that any of its technology-forcing air pollution control standards or emission limitations, contained in its State Implementation Plan, are not compromised by a decision that would mandate EPA to consider economic and technological feasibility in its approval of state implementation plans. Similarly, California is concerned that any

[10]California Health and Safety Code section 41703. Examples of technology-forcing air pollution control standards and limitations are Rules 61 and 63 of the San Diego Air Pollution Control District. Rules 61 and 63, adopted in 1972, established a requirement that sources of hydrocarbons (which contribute to photochemical smog), mainly gasoline service stations and bulk storage tanks, have to install vapor recovery equipment which will capture virtually all escaping vapors and recover at least 90% of these vapors on a continuing basis. Recognizing that technology capable of meeting these standards was not available in 1972, the Directors of the Air Pollution Control District prescribed a future deadline for compliance, later extended to December 1974. The local legislative body determined that if the affected sources (mainly major oil companies) used good faith efforts to develop and perfect vapor control technology, such sources could be in compliance by the prescribed deadline. The effect of Rules 61 and 63 has been to force the development and perfection of "vacuum-assist" vapor control technology, which has recently demonstrated the capability of complying with these Rules. Arguments by affected sources, that compliance with Rules 61 and 63 is economically and technologically infeasible, have been raised before the legislative body (in an attempt to lower the standards), before the air pollution control hearing board (to obtain variance relief) and in state court (contesting the validity of the Rules). Although variances have been granted, arguments of economic and technological infeasibility have thus far not prevailed in weakening or invalidating Rules 61 and 63.

[11]California Health and Safety Code sections 42352(b), 42354, 42355, 42362, 42402, 42403.

of its technology-forcing standards or emission limitations not be compromised by a decision that Courts of Appeal (during judicial review of EPA plan approvals under section 307(b) of the Clean Air Act) must consider economic and technological feasibility, or must independently develop an evidentiary record of such feasibility through an appointed Master and review a state implementation plan based on such new record.

From the standpoint of law enforcement responsibilities[12] and from the standpoint of insuring that the integrity of the Clean Air Act's technology-forcing objectives are not weakened, the California Attorney General is vitally concerned with the outcome of this case.

Summary of Argument.

Section 110(a)(2) of the Clean Air Act sets forth the minimum requirements that must be contained in state implementation plans. In reviewing a proposed implementation plan for approval, the EPA Administrator's discretion is confined to determining if the minimum requirements are present. If the minimum requirements are met, the Administrator is obligated to approve the plan. There is nothing in Section 110(a)(2) that expressly or impliedly requires emission standards in state plans to be economically or technologically feasible and the Administrator may not by regulation or otherwise add a feasibility requirement to the approval process.

Similarly, a court reviewing the Administrator's action in approving an implementation plan may not

[12]The California Attorney General is authorized to enforce local air pollution control district rules and regulations. California Health and Safety Code Sections 41509, 42403.

consider economic and technological feasibility, since the court can only review whether the Administrator considered the statutory "relevant factors" set forth in Section 110(a)(2). It makes no difference that the grounds of alleged infeasibility arose after the 30-day review period in Section 307(b)(1). Even post 30-day review grounds of alleged infeasibility must be rejected because the reviewing court can only consider new grounds which would have been relevant had such grounds existed at the time of EPA's approval action under Section 110(a)(2).

The legislative history of the 1970 Clean Air Act Amendments makes it clear that Congress intended to preclude economic and technological feasibility from being a limiting factor in the approval or judicial review of implementation plans. In the Conference Committee version of the bill, all references to economic and technological feasibility of compliance were deliberately removed, except with respect to new source performance standards. Rather than limiting compliance to what was feasible, Congress intended that stationary emission sources go beyond what was immediately feasible or available and bear the burden of researching and developing new control technology, if necessary, to permit states to attain national ambient air quality standards by the statutorily prescribed deadlines.

With regard to Petitioner's due process concern that the Eighth Circuit's judgment below precludes infeasibility or impossibility of compliance from *ever* being considered, amicus curiae takes the position that the states may consider technological and economic feasibility during the preparation of State implementation plans, in allocating clean-up burdens among individual

emission sources or classes of sources—so long as such considerations do not prevent timely attainment and maintenance of the national ambient air standards. The Clean Air Act, however, does not compel the states to consider technological and economic feasibility during the preparation of implementation plans. The states are free to adopt technology-forcing emission standards in their implementation plans which otherwise might be precluded on grounds of technological or economic infeasibility. In the event new grounds arise which allegedly justify a relaxation of technology-forcing emission standards, affected emission sources must initially seek relief at the state level by petitioning the appropriate agency to revise the standard. A state may then consider technological and economic factors in reallocating clean-up burdens based on such new grounds, so long as timely attainment of the national standards is not thereby impaired. New grounds arising after EPA approval of a state implementation plan may also serve as a basis for granting affected emission sources variance relief in the form of extensions to compliance deadlines—subject, again, to the requirement that timely attainment of the national ambient standards is not impaired.

In addition, "safety valves", expressly provided by the Clean Air Act, permit consideration of economic and technological feasibility if, despite an emission source's good faith efforts to comply, technology is unavailable at the compliance deadline. Sections 110 (e), 110(f) and 113 contain the "safety valves"; these provisions belie petitioner's claim that the Eighth Circuit's holding would violate due process.

The Eighth Circuit's decision below should be affirmed.

ARGUMENT.

I

In Reviewing the Validity of an EPA-Approved State Implementation Plan, the Court of Appeal May Not Consider Alleged Grounds of Economic and Technological Infeasibility. Infeasibility May, However, Be Considered at Other Stages During the Implementation of the Clean Air Act.

The Court of Appeal's jurisdiction, under Section 307(b)(1) of the Clean Air Act, to review the validity of an EPA-approved state implementation plan, is confined by the very terms of that Section to reviewing the EPA Administrator's approval action. It is necessary, therefore, to look first at the statutory provisions governing the Administrator's approval action.

A. Section 110(a)(2) Contains the "Relevant Factors" Defining and Limiting the EPA Administrator's Action in Approving State Implementation Plans.

The Eighth Circuit's Opinion below correctly construes Section 110(a)(2) of the Clean Air Act[13] to preclude the EPA Administrator from considering economic and technological feasibility of compliance in its review of proposed state implementation plans (SIPs). Section 110(a)(2)(A)-(H) limits the Administrator's discretion in approving or disapproving SIPs to a consideration of the following "relevant factors":

> 1. Whether the SIP or portions thereof were adopted after reasonable notice and hearing [Section 110(a)(2)];
>
> 2. Whether the SIP provides for attainment of the national primary ambient air quality stand-

[13] 42 USC section 1857c-5(a)(2).

ards *as expeditiously as practicable, but in no case later than three years from the date of approval,* or whether the SIP specifies a reasonable time for attaining the national secondary standards [Section 110(a)(2)(A)] (emphasis added);

3. Whether the SIP contains the requisite emission limitations, schedules, and timetables for compliance with such limitations and any other necessary measures for insuring attainment and maintenance of the primary and secondary standards [Section 110(a)(2)(B)];

4. Whether the SIP contains provisions for establishing and operating devices, systems and procedures for monitoring data on ambient air quality and making such data available to EPA [Section 110(a)(2)(C)];

5. Whether the SIP contains procedures for pre-construction review of the location of new stationary sources subject to Section 111 new source performance standards [Section 110(a)(2)(D)];

6. Whether the SIP contains adequate provisions for intergovernmental cooperation in controlling interstate or inter-regional pollution [Section 110(a)(2)(E)];

7. Whether the SIP contains necessary assurances that the state can carry out the SIP, whether the SIP requires source monitoring of emissions and periodic reports on the nature and amount of emissions, whether the SIP provides that emissions data is correlated with emission limitations and standards and is made available to the public, and whether the SIP contains adequate plans and

authority for dealing with air pollution emergencies [Section 110(a)(2)(F)];

8. Whether the SIP provides, "to the extent necessary and practicable" for periodic inspection and testing of motor vehicles in order to enforce compliance with applicable vehicle emission standards [Section 110(a)(2)(G)];

9. Whether the SIP provides for revisions, after public hearings, in order to take into account revisions of national primary or secondary standards "or the availability of improved or more expeditious methods of achieving" . . . [such standards] [Section 110(a)(2)(H)];

10. Whether the SIP provides for revisions, after public hearings, whenever the EPA Administrator determines "on the basis of information available to him" that the SIP is "substantially inadequate" to achieve the primary and secondary standards [Section 110(a)(2)(H)].

These specific determinations, required to be made by the EPA Administrator in reviewing proposed SIPs, reflect the minimum acceptable content of implementation plans which Congress intended to allow. As this Court recently stated: "Section 110(a)(2) quite clearly mandates approval of any plan which satisfies its minimum conditions." *Train v. NRDC*, 421 U.S. 60, 71, note 11 (1975). There is not a single word or phrase in Section 110(2)(2) which expressly or impliedly requires the EPA Administrator to consider the economic and technological feasibility of compliance in a SIP or portion thereof. On the contrary, the specific determinations which the EPA Administrator is required to make before approving a SIP make

it clear that Congress intended that state implementation plans be as strong as is necessary to achieve the national primary ambient air quality standards by the prescribed deadline. The thrust of Section 110(a)(2) is to limit the EPA Administrator's discretion to insuring that SIPs contain sufficient implementation mechanisms to enable achieving the primary ambient air quality standards within the prescribed time deadline.

The petitioner and its amici, however, point to the phrases "as expeditiously as practicable" and "reasonable time" in Section 110(2)(2)(A), and argue that these words inherently require consideration of economic and technological feasibility of compliance by the EPA Administrator in order for him to determine if those SIP content requirements are satisfied. The Third Circuit, in *St. Joe Minerals v. EPA*, 508 F.2d 743 (3rd Cir., 1975), *cert.* pending No. 74-1650, used the same analysis in holding that the Administrator was not prevented from considering the economic and technological feasibility of compliance in disapproving a portion of the Pennsylvania SIP on those grounds. *See also Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3rd Cir., 1972); *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3rd Cir., 1973) (Duquesne I); *Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1193-1194 (3rd Cir., 1975) (Duquesne II).

Amicus curiae disagrees with petitioner's and the Third Circuit's analyses. If the phrases "as expeditiously as practicable" (in the context of achieving primary standards) and within "a reasonable time" (in the context of achieving secondary standards) are to have any significance, they must mean that the EPA Administrator is to review a SIP, in the context of those

phrases, to determine if that plan is *tough enough* to attain the standards. As to the phrase "reasonable time" within which a SIP proposes to meet secondary standards, EPA's review inquiry is to determine whether a *lesser*, not a greater, time period is required in the SIP before approval can be given. The phrase "as expeditiously as practicable," especially when viewed in the light of the legislative history of the 1970 Amendments, contemplates that SIPs be able to attain the primary ambient air quality standards *sooner* than the prescribed statutory deadline.

The Third Circuit in *St. Joe Minerals v. EPA*, *supra*, goes further and concludes that EPA is not prevented by Section 116 of the Clear Air Act,[14] from disapproving a SIP for economic and technological feasibility reasons and adopting a less stringent plan. Section 116, the Third Circuit argues, was intended only to permit a state, "under state law, to enforce stricter pollution controls than those that are included in the EPA approved implementation plan." *St. Joe Minerals Corp. v. EPA, supra*, 748. Thus, the Third Circuit believes that solely apart from the "applicable implementation plan," and solely under state law, a state may adopt and enforce a more stringent, technology-forcing emission standard or limitation under Section 116. The Third Circuit, however, has misconstrued Section 116. Section 116 was put in the Clean Air Act to protect those few states that may adopt stricter standards from attacks by affected industry, based on a preemption rationale. *Exxon v. New York City*, 372 F.Supp. 335 (S.D.N.Y. 1974). Furthermore, the Energy Supply and Environmental Coordina-

[14] 42 USC §1857d-1.

tion Act of 1974 directs EPA to review SIPs to determine if they contain emission standards more stringent than necessary to achieve timely attainment of the national ambient standards. Clean Air Act Section 110(a)(3)(B) (added in 1974). Clearly, Congress believed that any such more stringent requirements were contained *in* state implementation plans, not outside them.[15] Amicus curiae urges the Court to make this point clear in deciding this case.

Petitioner's argument that the words "practicable" and "reasonable" in Section 110(a)(2) require the EPA Administrator to consider economic and technological feasibility as a red herring. In Priority I areas (where SO^2 ambient standards are being violated), virtually all state implementation plans provide for attainment of the primary and secondary ambient sulfur dioxide air quality standards by July 1975—the maximum time allowed by the statutory terms of the Clean Air Act. Section 110(a)(2)(A); 40 C.F.R. section 52 *et seq.*[16] In some SIPs, the attainment dates for sulfur dioxide ambient air quality standards have been extended beyond the statutory deadline by the EPA Administrator pursuant to section 110(e). As a practical matter, sulfur dioxide emission sources have been given the maximum time allowed by Congress to achieve the primary and secondary ambient SO^2 standards. Even if the EPA

[15]It must also be noted that under the Third Circuit's analysis of Section 116 in *St. Joe Minerals Corp. v. EPA*, *supra*, the citizen suit provisions in Section 304 of the Clean Air Act could not be utilized to enforce stricter state-enacted technology-forcing emission limitations. This result is contrary to the intent of Congress in adopting Section 304. Sen. Rep. No. 1196, 91st Cong. 2d Sess. 36-39, 64-65 (1970).

[16]*E.g.*, Missouri's SIP attainment date for primary and secondary ambient SO^2 air quality standards is July 1975. 40 C.F.R. section 52.1332.

Administrator had statutory authority to consider economic and technological feasibility—which he does not have—in reviewing a proposed SO^2 emission limitation or compliance schedule, the EPA Administrator would still be required to approve a state implementation plan that allows SO^2 emission sources the *maximum time* permitted by Section 110(2)(2)(A) in which to attain ambient SO^2 standards. *Train v. NRDC*, 421 U.S. 60, 71 (1975).

Petitioners and their amici curiae also argue that, since the ability of a state implementation plan to assure timely attainment of the ambient air quality standards may turn on whether necessary fuels and technology for compliance are available or will be available within the specified time, the EPA Administrator must necessarily consider the economic and technological feasibility of the plan. This argument—particularly with respect to energy supplies—is answered by the Energy Supply and Environmental Coordination Act of 1974 (ESECA), Pub. L. No. 93-319. In this Act, Congress recognized that the shortage of clean energy supplies might affect attainment of the primary ambient standards, yet Congress refused to compromise timely attainment of these standards on grounds of economic and technological feasibility. In Section 110 (a)(3)(B), added by ESECA to the Clean Air Act in 1974, Congress gave the EPA Administrator authority to review SIPs to determine whether emission standards or limitations on fossil-fuel burning stationary sources could be relaxed without compromising the timely attainment and maintenance of the national ambient air quality standards. If the EPA Administrator determines that such relaxation is possible, he is

required to notify the affected state that it *may* submit a plan revision. Thus, the EPA Administrator cannot require such relaxation of emission limitations, but only suggest to the states that they be made. Congress is aware of the energy supply arguments raised by Petitioner—the alleged new grounds of economic and technological unfeasibility—but has refused to allow the national air quality standards to be compromised by these considerations.

The First, Fifth, Sixth, Seventh and Ninth Circuits all agree with the Eighth Circuit that, at the plan approval stage, the EPA Administrator is precluded from considering the economic and technological feasibility of such plans or their component emission standards and limitations.[17] This view, of course, does not mean that economic and technological feasibility may never be considered. Arguments I.D. and II, *infra,* address amicus curiae's view on when and to what extent economic and technological feasibility may be considered.

The Fifth Circuit has succinctly upheld the validity of technology-forcing emission limitations where the record showed that compliance was technologically infeasible at the time the limitation was adopted:

> "There is no basis whatever in the record for concluding that a compliance date of May 31, 1975, is technologically feasible. . . . However, we do not believe that this fact makes the regulation arbitrary or capricious. . ." *State of Texas v. EPA,* 499 F.2d 289, 317 (5th Cir. 1974).

[17] *NRDC v. EPA,* 478 F.2d 875, 885, 889 (1st Cir. 1973); *State of Texas v. EPA,* 499 F.2d 289, 317 (5th Cir. 1974); *Buckeye Power Inc. v. EPA* (Buckeye II) .... F.2d ...., 8 ERC 1317, 1320 (6th Cir. 1975); *Indiana & Mich. Electric Co. v. EPA,* 509 F.2d 839, 844-845 (7th Cir. 1975); *NRDC v. EPA,* 507 F.2d 905, 914 (9th Cir. 1974). *See also Society of the Plastics Industry v. OSHA,* 509 F.2d 1310 (2d Cir. 1975) *cert. den. sub nom. Firestone Plastics Co. v. U.S. Dept. of Labor,* 43 LW 3625 (May 27, 1975). In this case, the Second Circuit upheld the validity of OSHA's vinyl chloride exposure standard in the face of evidence that compliance was infeasible and might be for years to come.

The Ninth Circuit recently held in *Kennecott Copper Corp. v. Train,* .... F.2d .... (9th Cir. 1975) (Slip Opinion No. 75-1335 November 28, 1975) that Section 110(a)(2)(B), 42 USC section 1857c-5(a)(2)(B) provides statutory authority for EPA to promulgate regulations requiring a stationary source of pollution to engage in research to develop and apply continuous emission control technology that will enable timely attainment of the national ambient air standards. The Ninth Circuit held that the phrase in Section 110(a)(2)(B) ". . . and such other measures as may be necessary to insure attainment and maintenance. . ." requires the use of continuous emission reduction measures if necessary for timely attainment of the national standards. *Kennecott Copper Corp. v. Train, supra,* Slip Opinion 4-5. If feasible emission reduction technology is not available, then EPA (and, we would argue, the states) may require the source to undertake research and development of improved emission reduction technology that will enable timely attainment and maintenance of the standards. The Fifth and Sixth Circuits agree with this interpretation of Section 110(a)(2)(B). *NRDC v. Train,* 489 F.2d 390 (5th Cir. 1974), *reversed in part on other grounds sub nom. Train v. NRDC,* 421 U.S. 60 (1975); *State of Texas v. EPA,* 499 F.2d 289, 311 (5th Cir. 1974); *Big Rivers Electric Corp. v. EPA,* 523 F.2d 16, 21 (6th Cir.

1975). These case decisions are consistent with the view that economic and technological feasibility is not relevant at the plan approval stage.

B. Section 110(a)(2) Contains the "Relevant Factors" Governing the Scope of Judicial Review in Section 307(b)(1) Cases.

Since it is amicus curiae's position that the EPA Administrator may not disapprove a state implementation plan on grounds of economic and technological in feasibility, it follows that allegations of such infeasibility provide no basis for a petition for review of the Administrator's approval of a state implementation plan pursuant to Section 307(b)(1). Section 307(b)(1) provides only for judicial review to determine if the Administrator considered all the "relevant factors" in approving or disapproving a plan. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). The "relevant factors" confining the scope of the Court of Appeal's review, are those factors enumerated in Section 110(a)(2)(A)-(H), 42 USC section 1857c-5(a)(2)(A)-(H). Although the Court of Appeal is to make a searching and careful inquiry to determine if the Administrator considered the relevant factors, the scope of judicial review is limited to deciding whether the Administrator's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park v. Volpe, supra,* 416. Thus, unless the Clean Air Act's provisions specify that economic and technological feasibility are "relevant factors", petitions for review based solely on allegations of economic and technological infeasibility must be dismissed by the Court of Appeal. Furthermore, it makes no difference whether the alleged grounds of infeasibility arise before or after the 30-day review period set forth in Section 307(b)(1). In either case it is the Administrator's approval action that is being challenged and in either case the Administrator's action in approving or disapproving SIPs is to be guided solely by the "relevant factors" in Section 110(a)(2). Petitioner argues, however, that in enacting the 1970 Amendments Congress "could not and knew it could not know what the future might hold." Pet. Br. p. 14. But Congress certainly knew that it was asking industry to do what might have seemed impossible at that time. 116 Cong. Rec. 32901-02 (1970). This is precisely the nature of the technology-forcing objective which Congress adopted in the 1970 Amendments. To allow judicial review and invalidation of a state plan based on new (or old) grounds of economic and technological infeasibility would defeat the very purpose of technology-forcing.

With regard to alleged infeasibility grounds arising after the 30-day review period, Petitioners have also argued that the Court of Appeals, under Section 307(b)(1) has the jurisdiction and duty to engage in fact-finding, if necessary, by appointing a special Master to develop an evidentiary record. There is no legal basis for this argument. The Eighth Circuit, in the decision below, correctly declined to engage in such fact-finding. The DC Circuit, in *Oljato Chapter v. Train,* 515 F.2d 654 (DC Cir. 1975), correctly viewed the new "grounds" phrase in Section 307(b)(1) to mean at least that a petitioner seeking a revision of a new source performance standard must formally present the factual basis supporting the need for revising

the standard to the EPA Administrator before filing the petition in the District of Columbia Circuit. In this way, an evidentiary record can be developed at the agency level rather than directly by the Court of Appeal. Amicus curiae agrees with the analysis of *Oljato Chapter v. Train, supra,* and takes the position that, with respect to EPA-promulgated emission standards or plan requirements, any new grounds that allegedly justify a more relaxed standard must initially be presented to the EPA Administrator with a petition to revise the standard or requirement. With respect to state-originated emission standards contained in EPA-approved plans, amicus curiae takes the position that any new grounds, allegedly justifying a more relaxed standard, must be initially presented by the affected emission source to the appropriate state agency. *See* Section 110(a)(3)(B). That agency may then consider economic and technological infeasibility grounds, among others, in determining whether to revise the emission standard and re-allocate clean-up burdens among other sources. *See* Argument I D, *infra*. New grounds may also serve as the basis for seeking variance relief from compliance deadlines. During this process of asserting economic and technological infeasibility grounds at the state level, however, standards or requirements may not be revised in such a way as to preclude timely attainment of the national ambient air standards.

C. The Legislative History of the Clean Air Act Amendments of 1970 Demonstrates a Clear Congressional Intent to Preclude Considerations of Economic and Technological Feasibility From Interfering With the Timely Attainment of the National Ambient Air Quality Standards.

The Clean Air Act Amendments of 1970 were largely shaped by the Senate Bill [S. 4358, 91st Cong. 2d Sess. (1970)], particularly on the question of technology-forcing.[18] The Senate Report makes it clear that technical feasibility was no longer to interfere with timely attainment of air quality judged by Congress to be necessary for public health:

> "In the committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The committee determined that 1) the health of the people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with the application of available technology, would still be deleterious to public health.
>
> "Therefore the committee determined that existing sources of pollutants either should meet the standard of the law or be closed down."[19]

The House bill [H.R. 17255, 91st Cong., 2d Sess. (1970)] differed from the Senate bill by providing

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[18]*The Evolution of Technology Forcing,* 14-21, *supra,* note 3; *Union Electric v. EPA,* 515 F.2d 206, 215 note 30.

[19]Sen. Report No. 91-1196 91st Cong. 2d Sess. 2-3 (1970).

that the national air quality standards were to be achieved "within a reasonable time",[20] and by providing that "due consideration to the practicability and to the technological and economic feasibility of complying"[21] be given by the courts in enforcement proceedings. Other provisions in the House bill as well as remarks made during the floor debates indicate that the House committee believed economic and technological feasibility should be considered in setting emission standards and in achieving the national air quality goals.[22]

The differing House and Senate bills were sent to a conference committee and the outcome clearly favored the stronger, technology-forcing Senate version. As the Eighth Circuit pointed out in the opinion below:

> "The final form of the bill passed by both houses was worked out in conference. Although the conference agreement was technically a House bill, it is clear that the stronger Senate version prevailed in conference (footnote omitted)" *Union Electric v. EPA*, 515 F.2d 206, 215 (8th Cir. 1975).

Senator Eagleton's recollection, in the 1972 Clean Air Oversight Hearings, of the Conference Committee's deliberations underscores the Congressional intent of the final bill to eliminate all references to economic and technological feasibility except with respect to new source performance standards:

> "[T]he House had such language in the bill as: 'giving due consideration to economic and technological feasibility of compliance' that appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.
>
> ". . . .
>
> "That kind of language [economic and technological feasibility] appeared time and again in the House bill. We painstakingly deleted it everywhere it was to be found except on new source performance standards".[23]

Senator Eagleton's recollection of the Conference Committee deliberations is borne out by a comparison of the conference bill with the earlier Air Quality Act of 1967 and with the Senate and House bills.[24]

Clearly, the Eighth Circuit, in the opinion below, correctly gauged Congressional intent to preclude eco-

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[20]H.R. Rep. No. 91-1146, 91st Cong. 2d Sess. 26 (1970).

[21]H.R. Rep. No. 91-1146, 91st Cong. 2d Sess. 28 (1970).

[22]*Evolution of Technology Forcing*, 12-14, *supra*, note 3.

[23]Remarks of Senator Eagleton, *Hearings on Implementation of the Clean Air Act Amendments of 1970 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92nd Cong., 2d Session, part I (Title I) at 21 and 276 (1972).

The limited reference to feasibility in Section 111, as finally adopted, defines a standard of performance for new stationary sources as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." Section 111(a)(1), 42 USC section 1857c-6(a)(1). The fact that Congress expressly provided for a qualified feasibility requirement in the adoption of Section 111 new source performance standards, but omitted any language concerning economic or technological feasibility in Section 110, further underscores that Congress deliberately intended that such factors were not to be considered during the plan approval stage.

[24]*The Evolution of Technology Forcing*, 20-21, *supra*, note 3.

nomic and technological factors from the Administrator's consideration of whether to approve an implementation plan.

D. During the Formulation or Revision of State Implementation Plans, Economic and Technological Feasibility May Be Considered in Allocating Clean-Up Burdens Among Emission Sources or Classes of Sources.

A major concern of the Petitioner appears to be that the Eighth Circuit's judgment below would preclude economic and technological feasibility from ever being considered. That is not the case. As a practical matter, the states have considered feasibility in preparing or revising their implementation plans in order to allocate clean-up burdens among emission sources in a way that best serves the public interest.

This Court has noted in *Train v. NRDC*, 421 U.S. 60, 64 (1975), that the Clean Air Act Amendments of 1970 explicitly preserved the principle that "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State". Section 107(a); 42 USC section c-2(a). Not only may States establish emission standards and limitations more stringent than necessary to attain and maintain federal ambient air standards (Section 116; 42 USC section 1857d-1), but they may also "adopt whatever mix of emission limitations [they] deem best suited to [their] particular situation". *Train v. NRDC, supra* 79. "The Act gives the agency [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are a part of a plan which satisfies the standards of section 110(a)(2) . . ." (*Id.* at 79) and ". . . so long as the ultimate

effect of a State's choice of emission limitations is compliance with the national standards for ambient air . . ." *Train v. NRDC, supra* 79. The Clean Air Act thus permits States to select emission limitations or standards for its implementation plan which may be economically or technologically infeasible at the time of their adoption, as well as to adopt emission standards based on considerations of feasibility.

The preservation of the State's right to adopt technology-forcing emission standards is an aspect of Congressional intent that the States, during preparation of their implementation plans, would make economic, social and technological *policy* decisions.[25] Such policy choices, based on public hearings, were intended to include judgments that certain emission sources required maximum pressure to develop effective technology for their control. Policy choices were also intended to include decisions, based on equity, economic or social considerations, that would permit maximum leeway for certain preferred sources to achieve compliance, so long as timely attainment of the ambient standards was achieved.[26] EPA's regulations for the preparation and submittal of State implementation plans recognize Congressional intent in giving the States flexibility to allocate attainment burdens on emission sources based on social and economic policy choices. 40 C.F.R. § 51.2(6) and (d).

During the preparation of a state implementation plan, a record of the public hearings and the legislative

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[25]These plans . . . involve public policy choices that citizens should make on the State and local level". Remarks of Senator Muskie in introducing the Conference version of the 1970 Amendments. 116 Cong. Rec. 20598 (1970).

[26]116 Cong. Rec. 16107 (1970). Remarks of Senator Cooper.

determinations of an enacting air pollution control agency might reflect considerations of economic and technological feasibility of compliance for classes of sources or single sources. It may then be tempting to assert that such a record should serve as the basis for the EPA Administrator, or for a Court of Appeal during judicial review, to reconsider such factors. But, as this Court has stated, "The Act gives the agency no authority to question the wisdom of a State's choice of emission limitations. . . ." *Train v. NRDC*, 421 U.S. 60, 79 (1975). For that reason, Amicus Curiae takes the position that a limited judicial review of the manner in which a State has apportioned clean-up burdens among sources or classes of sources is available only in State courts, and then only if timely petitions for judicial review are brought by affected sources. While the judicial review provisions of the Clean Air Act in section 307 do not expressly apply to State court review of an EPA approved plan, Amicus Curiae believes they should be construed to prohibit such review after the 30-day period has elapsed,[27] unless valid new grounds are raised. If an emission source fails to seek judicial review in the Court of Appeal within the 30-day period, but could later attack the validity of a State implementation plan in State court, the entire State effort to enforce and implement the plan to achieve timely attainment of the national standards would be compromised.

As stated in Argument I B above, the initially appropriate place for an affected emission source to raise new grounds of technological or economic infeasibility is before the state agency that adopts the emission

[27]Comment, 6 Rutgers-Camden Law Journal 810, 817 (1975).

standard. The state agency may then determine that it is appropriate to revise the emission standard so long as such revision does not preclude the timely attainment of the national ambient standards. *See* Section 110(a)(3)(B). Similarly, such new grounds of infeasibility may serve as a basis for granting an affected emission source an extension to its compliance deadline.

In summary, in the preparation of their implementation plans, states may consider but are not compelled to consider economic and technological feasibility of compliance with emission standards. Judicial review of such essentially legislative policy considerations may be held, if timely sought, only in State courts, limited by State laws governing judicial review.

II

Economic and Technological Feasibility May Be Relevant to Support Extensions and Postponements or in Fashioning Compliance Schedules and Enforcement Orders.

Petitioner has characterized the Eighth Circuit's decision below as holding that allegations of economic and technological infeasibility may never be raised. Petitioner's Brief, page 22. Thus, the petitioner has indirectly raised a due process claim. The Eighth Circuit's opinion did not so hold; it dealt only with section 307(b)(1) and whether economic and technological factors could be considered at the point in time when a Court is reviewing an EPA plan approval.

Congress expressly recognized the need to provide "safety valves" for compliance with technology-forcing standards when the right set of circumstances were present. Under section 110(e), 42 USC § 1857c-5(e),

provision is made for states to seek up to a two-year extension of the statutory deadline for attaining the primary ambient air standards. To approve any such extensions the EPA Administrator must find that one or more emission sources are unable to comply because necessary technology "or other alternatives" are not available or will not be available soon enough. Section 110(e)(1)A; 42 USC § 1857c-5(e)(1)(A). The Administrator must also find that the State has considered and applied "reasonably available alternative means of attaining such primary standard". Section 110(e)(1)(B); 42 USC § 1857c-5(e)(1)(B).

In addition, the Clean Air Act expressly provides a mechanism for postponing for one year any compliance deadlines for particular emission sources. Section 110(f); 42 USC § 1857c-5(f). In order to grant any such postponements, the Administrator must find among other things that "good faith efforts have been made to comply," that compliance is not possible due to unavailability of necessary technology, that the public health is being protected as much as possible, and that the national security requires continued operation of the source or class of sources. Section 110(f)(1)(A)-(D); 42 USC section 1857c-5(f)(1)(A)-(D).

Under section 110(a)(3), revisions to a State implementation plan, which reflect new allocations of economic and technological burdens on emission sources, may also be submitted by a State and be approved by EPA, so long as the overall timely attainment

of the national standards is not impaired. 42 USC section 1857c-5(a)(3).

Pursuant to the holding of this Court in *Train v. NRDC*, 421 U.S. 60 (1975), a source may also seek variance relief pursuant to a State implementation plan even if the accompanying compliance schedule permits the source to achieve the emission standard after the attainment date of the national ambient standards. *Train v. NRDC*, however, carefully limits such post-attainment date variances to be consistent with the State's overall ability to achieve timely compliance with the national standards. *Train v. NRDC, supra*, 79.

Similarly in section 113 enforcement proceedings, the EPA Administrator may consider economic and technological infeasibility in conjunction with the source's good faith efforts to comply, in fashioning appropriate enforcement orders extending the time allowed to achieve an emission standard or limitation. Section 113(a)(4); 42 USC section 1857c-8(a)(4). Amicus curiae takes the position, however, that economic and technological infeasibility cannot constitute an absolute defense to compliance. Any enforcement order fashioned after considering feasibility factors cannot alter the emission standard or limitation itself, but only extend the time deadline for compliance. Similarly, amicus curiae takes the position that defenses based on economic or technological infeasibility are relevant only as to the affected source's compliance,

and may not be raised to attack the validity of the implementation plan, control strategy, or emission standard itself.[28]

In sum, the due process concerns indirectly raised by petitioner have no merit. Adequate "safety valves" are present in the Clean Air Act to provide relief to affected emission sources which, notwithstanding their good faith efforts to comply, are faced with economic or technological impossibility of compliance.

Conclusion.

The Eighth Circuit's opinion below has correctly gauged the legislative history of the Clean Air Act's technology-forcing objective and correctly ruled that the EPA Administrator is precluded from considering economic and technological feasibility at the plan approval stage. Necessarily, a reviewing Court of Appeal is also without jurisdiction to consider such factors. Consideration of such factors at the plan approval stage would inevitably involve protracted delays in the promulgation of applicable implementation plans. Consideration of such factors would remove the incentive to force industry to develop necessary control technology that may not exist at the time a plan

[28] *See* Luneburg & Roselle, *Judicial Review Under The Clean Air Act Amendments of 1970,* 15 B.C. Ind. & Com. L.R.667, 675-76 (1974): "Invalidation at the enforcement level . . . . might leave insufficient time to re-promulgate, let alone expect compliance with, the controls. Moreover, without a provision foreclosing review of a plan's validity at the enforcement stage, there would be no assurance that some other enforcement court in the future would not invalidate the new plan and therefore start the process all over again."

is prepared. If Petitioner is correct, the integrity of Title I of the Clean Air Act Amendments of 1970 will be compromised and we will return to the pre-1970 era when the pace of development of pollution control technology was largely dictated by the pollution sources themselves. For these reasons, Amicus Curiae urges this Court to affirm the Eighth Circuit's judgment below.

Respectfully submitted,

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